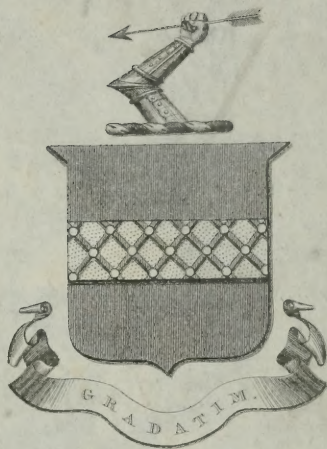


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THE INSTITUTES OF GAIUS

AND

RULES OF ULPIAN.

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THE

# INSTITUTES OF GAIUS

AND

## RULES OF ULPIAN.

THE FORMER FROM STUEDEMUND'S APOGRAPH  
OF THE VERONA CODEX.

WITH

*TRANSLATION AND NOTES, CRITICAL AND EXPLANATORY,  
AND COPIOUS ALPHABETICAL DIGEST.*

BY

JAMES MUIRHEAD,


PROFESSOR OF THE CIVIL LAW IN THE UNIVERSITY OF EDINBURGH.

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## PREFACE.

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SOME apology may be thought necessary for a new edition of the Institutional Commentaries of Gaius, with Translation and Notes, in presence of the two excellent ones we already possess from the pens of Mr. Poste and Messrs. Abdy and Walker. It is that neither of these incorporates the results of Studemund's revision of the Verona Codex.

I began this book with no other intention than that of correcting from his Apograph my own copy of the text previously in use. I soon found that the margins were insufficient to contain the amendments his fac-simile revealed, and that every here and there an interleaved note was required. Before long I was so impressed with the value of the corrections and additions that it became a matter of regret to me that they were not accessible to students. So I set myself, in the hours I could spare from other duties, to prepare an edition for college use; and, to make it more serviceable, I eventually resolved to add to it a translation and notes.

Had the recent editions of Krueger, Huschke, and Polenaar, which all embody Studemund's amendments, been published earlier, my task probably would never have been undertaken; they are the work of much more competent hands than mine, directed by profound knowledge of their subject, and by great critical and palæographical experience. But that of Krueger, edited in conjunction with Studemund himself, did not appear until the end of 1877; Huschke's appeared last year; and the last part of Polenaar's only in the beginning of the present one. Their successive publication has contributed to the delay in the appearance of the present volume; for they occasioned three revisions of my text after its completion, that I might have the opportunity of introducing any readings of theirs that seemed to me preferable to my own. It was with agreeable surprise I found how little those I had adopted varied from those of Krueger and Huschke; frequently when I differed from them I accepted their interpretations

without hesitation ; sometimes, notwithstanding my unbounded respect for the authority of two such masters, I have unfortunately felt constrained to adhere to my own humble opinion, and mention its divergence in the footnotes.

To affirm that the Institutes of Gaius are worthy of being submitted to the student in as complete and perfect a form as it is possible to give them, is happily at the present day superfluous ; they are everywhere regarded and studied as the necessary complement of those of Justinian. In the one we have the outlines of the nearly completed fabric of Roman jurisprudence, when its law and equity had almost ceased to be distinguishable ; in the other we have before us the separate fabrics of the *jus civile* and the *jus honorarium*, and can see the portals of the latter opening to those who have been repulsed from the former. In other words, we can trace step by step in the pages of Gaius the process whereby Rome's natural law was developed alongside her civil law, and the way prepared for that matured jurisprudence which the compilations of Justinian have preserved.

In the short Introduction that follows will be found all that it seems essential for the student to know of Gaius and his Institutes, of the Verona Codex and Studemund's Apograph. I have particularly to request his attention to the explanations he will find there of the peculiarities of typography it has been considered expedient to employ in the text and translation.

To the Institutes of Gaius I have appended what are commonly known as Ulpian's Fragments,—a portion, and unfortunately all we possess, of an abridgment by an unknown hand, made probably in the early part of the fourth century, of his Book of Rules. In regard to them and their author I have also said a few words in the Introduction.

To both I have added a copious Alphabetical Digest. I well remember the difficulties I experienced in my student-days from the want of such a *conspectus* ; and I cherish the hope that it may prove of service to some who are only commencing their study of the law of Rome. To others also it may possibly be found useful, who have no intention of devoting themselves to jurisprudence, yet are occasionally puzzled by allusions they find to its rules and institutions in the pages of the classical writers.

Some *corrigenda* are noted on p. 435.

EDINBURGH, November, 1879.



# INTRODUCTION.



## I.—GAIUS.

1. His Period and Place in Jurisprudence.
2. His Institutes.
3. The Verona Codex.
4. Studemund's Apograph.
5. The Present Edition.
6. Typographical Explanations.
7. The Translation and Notes.

1. *Gaius' Period and Place in Jurisprudence.*—Of the history of Gaius we unfortunately know little; for though he was *Gaius Noster*, as Justinian calls him, with the Byzantines of the fifth and sixth centuries,—‘the Gaius whom we all know so well,’—he is unmentioned by any of his contemporaries or successors of the classical period. That before the death of Hadrian he was old enough to take note of passing events we gather from an observation of his own in a passage from his pen preserved in the Digest; and internal evidence testifies that his works were written in the reigns of Antoninus Pius and Verus and Marcus Aurelius. Whether he was a Roman or a provincial jurist is a matter of controversy. The latter view is espoused by Mommsen, who has assigned his reasons for entertaining it in an elaborate paper in the *Jahrbuecher des gemeinen deutschen Rechts*, vol. iii, p. 1; but Huschke, whose opinion on any question of Ante-Justinian law or its history must always be received with the utmost respect, seems inclined to arrive at a different result. Whether or not he possessed the *jus respondendi*, which he himself describes in § 7 of the First Book of his Institutes, is also disputed: some, relying on the fact that Justinian's instructions to his Digest Commissioners were to make use only of those authors who had the imperial licence, and that Gaius is one whom they utilised to a large extent, maintain the affirmative; while others think that in his case, and

because of his repute in the schools, those instructions were disregarded.

It is quite certain that we have no record of any of his Responses; and there is good reason to think that he was not so much a practitioner as a teacher and a literary jurist. He himself refers in his *Institutes* to three or four earlier works: one on the writings of Q. Mucius Scaevola, one on the Edict, one on *Bonorum Possessio*, and another on the Rights of Patrons. On the Edict, both urban and provincial, he wrote voluminously; and amongst other treatises of his from which passages are preserved in the Digest the more important are his Commentary on the Twelve Tables and his *Libri Rerum Cottidianarum*,—his *Aurea* or Golden Sayings, as they came to be called at a later period. To the last Justinian specially refers in his preface to his *Institutes*. From the remains of them which we possess it is impossible to judge of their purpose; they are written more carefully and elaborately than one would expect to be the case with daily jottings, as some regard them, and rather give the impression of being materials for a more ambitious work, which its author did not live to complete.

2. *His Institutes*.—The *Institutionum Commentarii Quattuor*, reproduced in the following pages, seem to have been written partly in the reign of Antoninus Pius, partly in that of Marcus Aurelius. It has been suggested that they are not directly the work of Gaius, but rather notes of his lectures made by an auditor. There are no doubt turns of expression in them that afford grounds for such a surmise; but taking them as a whole they do not convey the idea of the record of a spoken discourse; they are much more of the nature of a text, requiring exposition and illustration by a speaker. Had they not been a genuine work of Gaius' they could hardly have enjoyed the reputation which caused them to be used as the elementary text-book from the time of the establishment of the Constantinople law-school in 425 down to that of Justinian's reforms in 533, to be drawn upon so largely as authoritative statements of Roman law in the *Collatio Legum Romanarum et Mosaiicarum* in the beginning of the fifth century, and to be epitomised by Alaric's commissioners for his *Lex Romana Visigothorum* in 506.

That Justinian, in the *Institutes* that bear his name, had borrowed largely from the earlier ones of Gaius, was a fact well known; but it was not until the Verona MS. was deciphered that

the extent of his obligations to them was disclosed. It was impossible to discover it from the West Gothic Epitome, in two books, of the matter contained in the first three of the genuine Commentaries; and comparison of the Justinianian Institutes with passages in the Digest that bear to be excerpted from those of Gaius showed no more than this,—that in several places the later work was a literal transcript of the earlier. But now we know, that although other books dating from the Antoninian period were brought into requisition by the authors of the Justinianian compilation, and that a good deal of new matter was clumsily introduced to adapt it to the existing state of the law, not only was Gaius taken as their model in plan and construction, but his text was really made the basis of theirs.

3. *The Verona Codex.* — In 1732, and again in 1742, Scipio Maffei, in describing some of the manuscripts in the Chapter Library at Verona, referred to and printed a stray leaf, which he supposed had been cut either out of a copy of the Pandects or out of some compendium of Justinian's Institutes, and of which the greater part dealt with the subject of interdicts. Somehow this escaped the notice of the jurists until 1816, when Haubold lighted upon it, and at once came to the conclusion it was a leaf from the long-lost Gaius. Almost at the same moment, by a curious coincidence, Niebuhr was passing through Verona, visited the library, came upon the same leaf, and arrived at the same conclusion. But simultaneously he made a much more important discovery; for, underneath what had previously passed for no more than a copy of the Epistles of St. Jerome, he detected the very copy of the Institutes of Gaius from which the leaf in question had been extracted.

Niebuhr's discovery was promptly communicated to Savigny; and in the following year, at his suggestion, Goeschen and Bekker were deputed by the Prussian Academy of Sciences to proceed to Verona to make a transcript. Bekker having soon afterwards been prevented by other duties from going on with the undertaking, Bethmann-Hollweg became Goeschen's associate. Their task was no easy one; for not only had the ms. of St. Jerome to be removed, but on some leaves an intermediate writing; and the difficulty of reviving the original characters was increased by the fact that in many places they had been erased with pumice-stone, and the parchment thus rendered susceptible of serious injury from the



use of even the mildest chemicals. They succeeded so far, however, as to be able to give to the world in the end of 1820 the first edition of the complete *Institutiones* or Institutional Commentaries of Gaius.

Two years later Blume was in Verona, and seized the opportunity to revise those pages of the MS. that had yielded Goeschen his least fruitful results. It appears from a communication of Blume's to one of the German law journals in 1864, that, through loss in transit by post of a communication to Hugo, the world never got the full benefit of his readings. This is the more to be deplored, as it is to his somewhat reckless use of chemicals, far more powerful than those Goeschen had ventured to employ, that some pages of the MS. have been reduced to a condition which leaves even the most sanguine little ground for expectation that they will ever be deciphered.

4. *Studemund's Apograph*.—Although Boecking, in 1866, published what he called an Apograph of the Verona Codex, yet it was in reality produced not from the original, but from the copies made by Goeschen, Hollweg, and Blume, preserved in the Royal Library at Berlin. Leaving out of account as of little value what was done by Tedeschi in 1856, the only conscientious revision of the MS. that has been accomplished since Goeschen and Hollweg's is that of Studemund, commissioned, as they had been, by the Prussian Academy. He began his labours in 1866, and in 1867 and 1868 had the benefit occasionally of the advice and assistance of Mommsen and Krueger. Interruptions from various causes, and the deplorable condition of some of the leaves, made the revision a work of years; but when completed the results were considered so valuable, that the same learned body at whose instigation the task had been commenced resolved that jurisprudence should have the benefit of them in a reproduction approaching as nearly as possible to a fac-simile. Types truthfully representing the letters of the MS., with its abbreviations and other marks, were cast for the purpose from a photographic reproduction of one of the sheets; and the Apographum was eventually published in a magnificent quarto volume in the beginning of 1874.

The MS., it must be admitted, displays many imperfections. It seems to have been written, as the best judges are at one in thinking, in the earlier half of the sixth century, and probably, as the

absence of the Greek quotations suggests, in Italy. Of the 258 pages, each of 24 lines, which it originally embraced, six, *i.e.* three leaves, have disappeared, viz. those between pages 80 and 81, 126 and 127, and 194 and 195, as now numbered. Of those that remain there are but two—those on the leaf published by Maffei—that are not palimpsest; and of those of them that have been three times written on very little is decipherable. Throughout they abound in contractions and conventional abbreviations; of these one cannot well complain, for they are in accordance with the practice of the period. But the execution is slovenly,—the work apparently of a scribe more than usually careless, who seems to have frequently fallen half asleep over his task, here omitting not words merely but lines or even sentences, there repeating them not once only but sometimes twice. He has often incorporated in his text what in that he was reproducing were merely marginal or inter-linear glosses, due not to Gaius but an annotator; and his own transcript has here and there been subjected to correction, or what was intended as such, by a later hand.

Studemund has most properly refrained from any attempt to remedy those defects, and as far as possible reproduced the text of the MS. exactly as it stands. But he carefully distinguishes those parts of it whose reading is so clear as to be past question, and those which he believes he has accurately deciphered but in which he may be mistaken; the former he reproduces in dark characters, the latter in faint ones. Where letters can be counted, yet not deciphered, they are indicated by asterisks; where no more can be said than that writing had once existed, a line — or lines are introduced to represent the illegible text; while here and there, following the MS., a space of a line or two is left entirely blank, indicating the transition from one subject to another. There are no numerals to indicate paragraphs; these were the device of Goeschen, and are occasionally found to be inconvenient as our knowledge of the text is increased.

5. *The Present Edition.*—The method of treatment that was alone legitimate in the reproduction of the Codex would be very inappropriate in an edition designed for the use of students and intended to represent the text of Gaius as completely as can be done with confidence. The blanks in the MS. must be filled wherever that can be done from other reliable sources, such as the

*Collatio* and the Digest and Institutes of Justinian; contractions and conventional signs must be interpreted and rendered in the words they seem to have been intended to represent; obvious clerical errors must be corrected; and manifest glosses, though they ought rarely to be deleted, should yet be carefully indicated. The editors and critics of the half century before 1874, operating on material less perfect than that which, thanks to Studemund, we now possess, have made this in many parts of the text comparatively easy; and not without considerable diffidence and hesitation can one venture anywhere to call in question the conclusions of such masters as Goeschen and Boecking, Huschke and Krueger, unless there be something revealed by the Apograph that throws a doubt on their accuracy. There are some passages, however, in which I have ventured to differ from them, alike in interpreting contractions, correcting clerical errors, and noting explanatory glosses. Illustrations of what seem to me legitimate amendments in each of those varieties of editorial duty will be found in II, § 112, II, § 118, and IV, § 16 respectively; and others will hardly fail to catch the eye of the careful reader.

6. *Typographical Explanations.*—Impressed with the importance of keeping the text as pure as possible, and of guarding against any suggestion of the absolute certainty of a reading which there is any room to question, I have had recourse to varieties of type, and to braces [ ] and marks of parenthesis ( ); and to the following explanations of them I ask the reader's particular attention:—

(1.) As much of the text as, according to the testimony of the Apograph, may be regarded as absolutely certain, is printed in ordinary roman type.

(2.) Trifling errors, omissions, and surplusages in the ms., if obviously clerical, are corrected, supplied, and deleted as of course, and without indication of them by peculiarity of type or otherwise.

(3.) What appear to be glosses, and not part of the original, are put within braces [ ], but without peculiarity of type.

(4.) What to Studemund is the apparent reading, but not absolutely certain, is printed in *italics*; but if verified from other sources it is in roman type.

(5.) What is illegible in the ms., but either obvious from the context or supplied from other reliable sources, is in *italics*, within marks of parenthesis ( ).

(6.) What there is no trace of in the ms., but is required to complete the sense, and is either supplied from other reliable sources or manifestly justified by the context, is in *italics*, within braces [ ].

(7.) Passages that are illegible in the ms., and pages that have disappeared, if incapable of being supplied without drawing purely on conjecture, are indicated by dashes, thus — — —; where there is material for it, the reconstructions that have been proposed are referred to in the footnotes.

7. *The Translation and Notes.*—In the translation I have aimed at accuracy rather than grace. I have abstained, as far as practicable, from the use of modern technical words; where they are unavoidable, and those of Scots and English law are different, I have naturally given the preference to the former; they have the advantage in most cases of coming nearer the Roman ones. The following are explanations of the peculiarities of type that occur in it:—

(1.) Words that are interpolated to elucidate the meaning are put within braces, thus [ ], but printed in roman type.

(2.) Passages that are illegible, or only partially legible in the text, but as to whose meaning there can be no reasonable doubt, are printed simply in *italics*.

(3.) What is supplied conjecturally as representing the probable general import of an illegible or imperfect passage is put in *italics* within braces [ ].

In the notes there is reference throughout to the corresponding passages, if any, in the Institutes of Justinian; and the rubrics of his titles are printed in capital letters in their proper places. The words ‘tit. I. *afd.*,’ which are of constant recurrence, mean the last preceding title of the Institutes whose rubric is so printed. In dates of enactments, etc., where a double number is given, the first refers to the year of Rome, the second to that before or after Christ, as the case may be. The authorities referred to by abbreviations are tabulated immediately after the Introduction.

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## II. ULPIAN.

8. His Place in Jurisprudence.
9. His ‘Book of Rules.’
10. The Present Edition.

8. *His Place in Jurisprudence.*—Domitius Ulpianus was a Phœnician, born probably about the year 170. While officiating



as an assessor to one of the praetors in Rome, he attracted the notice of Papinian, then praetorian prefect under Septimius Severus, and was by him promoted to his council. He is not said to have held office or taken any active part in public life under Caracalla; his greater works were written in the reign of that emperor, from which we may infer that he was holding aloof from politics, and devoting himself to jurisprudential literature. Although one of the historians speaks of him as praetorian prefect under Heliogabalus, this is hardly credible; for it was his efforts, when acting as the adviser of Alexander, to undo the mischievous policy of that prince, that brought upon him the enmity of the praetorian guard and induced his assassination.

The relations of Ulpian with Alexander Severus, and latterly with his mother Mammaea, were of the most friendly and confidential character. It has been frequently charged to his memory that he encouraged the persecution of the Christians; but the accusation rests on the most slender basis, and is contradicted by the whole life and conduct of the young prince whose guardian he was, and whose character he had a large part in forming. The general testimony of history affirms not merely his wisdom but his humanity; and supports the verdict of Lampridius that, if the reign of Alexander was a beneficent one, it was chiefly because he was guided by the advice of Ulpian, — *quia Ulpiani consiliiis praecipue rempublicam rexit*.

The greatest of Ulpian's literary works are his commentary on the *jus civile*, under the title of *Ad Sabinum libri LI*, and his commentary on the edict under the title of *Ad Edictum libri LXXXIII*. In addition to these there is a commentary on the Julian and Papia-Poppaeian law in twenty books, one on the office of the proconsul in ten, six books on testamentary trusts, a variety of monographs, some books of Responses, Opinions, Disputations, etc., and an institutional treatise in two books, — *Institutionum libri II*. But, with exception of a very few fragments elsewhere, these are known to us only through the extracts which Justinian has preserved in the Digest, and which are so numerous that they constitute about one-third of the whole collection.

9. *His 'Book of Rules.'*—Ulpian was the author of two sets of Rules, one in seven books, the other in a single book, — *Liber singularis Regularum*, of which we have a few extracts in the

*Collatio* and the Digest. An abridgment of this *Liber singularis* seems to have been made by an unknown hand soon after the year 320; the design of the epitomist, apparently, having been to exclude what had become obsolete or was simply of historical interest, and to retain only so much as gave expression to still current law.

Of this epitome a manuscript of the tenth century came into the possession of Jean Du Tillet, who published it in 1549, under the name of '*Tituli ex corpore Ulpiani*'; it is now in the Vatican, and is the only one known to exist. But it is incomplete. Ulpian, as we know from the sources already referred to, dealt with both obligations and actions; and, so far as can be judged, followed much the same lines as Gaius. But the manuscript of the epitome finishes abruptly with the law of succession, and is besides defective in its opening passages. It is nevertheless a precious monument of the classical jurisprudence. It is the remains, not of an institutional book, but of a handbook for the practitioner; a *vade mecum*, as modern law-writers would call it, of which every line almost embodies a doctrine. *Ulpiani Regulae*, says Mommsen most truly, *ea brevitate, perspicuitate, proprietate conscriptae sunt, quam adhuc secuti sumus omnes, assecutus est nemo.*

10. *The Present Edition.*—A book of which there exists but one Codex, and that has passed during three centuries through such hands as those of Cujas, Le Caron (Charondas), Schulting, Meerman, Cannegieter, Hugo, Boecking, Mommsen, Vahlen, Huschke, and Krueger, can need but little editing. My task therefore has been comparatively easy,—a holding of the balance between divergent readings in those places in which the manuscript is defective, indistinct, or manifestly corrupt; it is only very rarely that I have thought it necessary to suggest a reading of my own. I have abstained from following the attempts of some editors to indicate the places where passages have been omitted by the abridger; for the book is not Ulpian's, but only an epitome of Ulpian's; and it is enough to rectify the clerical errors and omissions of the transcriber of the manuscript, without vainly trying to reproduce the original *Liber Regularum* as it came from the pen of its author.

As regards the typography of the text, words in *italics* represent those that in the Codex are uncertain or corrupt, and words in

*italics* within braces [ ] represent those omitted *per incuriam* in the Codex, and supplied by the editors. In the translation words in *italics* within braces [ ] represent the probable general import of defective passages in the text, which in most cases it has not been attempted to reconstruct; words in roman type within braces [ ] have been interpolated for the sake of greater lucidity.

## TABLE OF AUTHORITIES.

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(The following Authorities are referred to in the Notes by the abbreviations prefixed to them. Those used to indicate the works of the ordinary classical writers are too familiar to require mention.)

APOGR. = *Gaii Institutionum . . . Codicis Veronensis Apographum . . . edidit Guilelmus Studemund, Lipsiae, 1874.*

ARCHIV. GIURID. = *Archivio Giuridico*, Pisa, Bologna, 1868-79; 23d volume now current.

ASCON. = *Asconii Pediani in Ciceronis Orationes Commentarii*. They were written about A.D. 60, and are to be found in various editions of Cicero. ✕

BAS. = *Basilicorum Libri LX*. The latest and best edition is that of W. E. Heimbach, 6 vols., Leipzig, 1833-70.

BEKKER, AKT. = *Die Aktionen des roemischen Privatrechts*, by Ernst Immanuel Bekker, Prof. in Greifswald, 2 vols., Berlin, 1871, 1873.

BETHMANN-HOLLWEG, R. CP. = *Der roemische Civilprozess*, by M. A. von Bethmann-Hollweg (died 1878), 3 vols., Bonn, 1864-66, forming the first part of his *Civilprozess des gemeinen Rechts in geschichtlicher Entwicklung*.

BK. (in notes to Gaius) = Boecking's (Eduard) 5th edition of Gaius, Leipzig, 1866. Boecking died 1870.

BK. (in notes to Ulp.) = Boecking's 4th edition of Ulpian's Fragments, Leipzig, 1855.

BL. = Blume's Collation of the Verona ms., utilised by Goeschen in his second edition of Gaius, and by Lachmann in his edition of 1842.

BOETH. = *Boethii Comment. in Ciceronis Topica*. They are in various editions of Cicero. Boethius died A.D. 524.

BRUNS, FONTES = *Fontes Juris Romani Antiqui*, by Carl Geo. Bruns, Prof. in Berlin; 3d ed., Tuebingen, 1876.

C. = Justinian's *Codex repetitae praelectionis*, in all editions of the *Corpus Juris*, and re-edited from the best MSS. by Krueger, Leipzig, 1873-77. ✕

C. GREG. = The Gregorian Code in the *Codicis Gregoriani et Codicis Hermogeniani Fragmenta*. The former was published about A.D. 295, the latter about 365. The last edition is that of Haenel, Bonn, 1837. Krueger proposes to reprint them in the third part of his, Mommsen's, and Studemund's *Collectio Librorum Juris Antejustiniani*.

C. TH. = *Codex Theodosianus*. It was published in 438. The last edition is that of Haenel, Bonn, 1842. ✕



- CANN. = *Dom. Ulpiani Fragmenta . . . quibus notas adjecit Joannes Cannegieter, Lugd. Bat.* 1874.
- X COLLAT. = *Lex Dei, sive Mosaicarum et Romanarum Legum Collatio*, of the third or fourth decade of the 5th century. Last separate edition by Blume, Bonn, 1833. Also in Huschke's *Jurisprudentia Antejustiniana* and other collections of ante-Justinian law. A new edition by Mommsen promised for that of Krueger, etc.
- X CONSULT. = *Consultatio veteris cujusdam Jurisconsulti*, of the first half of the 5th century. Last separate edition by Pugge, Bonn, 1834. Also in Huschke's and other collections of ante-Justinian law; and a new edition promised by Krueger.
- X CUJ. = Cujas's editions of Ulpian of 1566 and 1586, the latter reproduced in his *Opera Omnia*, 2d Naples edition (1757), vol. i, col. 301.
- X CUJ. NOTAE = Cujas's Notes on Ulpian, in the same volume.
- X CUJ. OBSERV. = *Cujacii Observationum et Emendationum, libri XXVIII*, in same edition of his works, vol. iii, col. 1.
- DANZ; DANZ, R. R.; or DANZ, GESCH. D. R. R. = *Lehrbuch der Geschichte des roemischen Rechts*, by Dr. H. A. A. Danz, Professor in Jena, 2d ed., 2 vols., Leipzig, 1871.
- DANZ, SACRALE SCHUTZ = *Der sacrale Schutz im roemischen Rechtsverkehr*, by the same author, Jena, 1857.
- D'ARNAUD = *Georgii D'Arnaud Variarum Conjecturarum libri duo, Leowardiae*, 1744. D'Arnaud died 1740.
- X D. or DIG. = Justinian's Digest or Pandects, in all editions of the *Corpus Juris Civilis*. The most trustworthy version is that of Mommsen, 2 vols., Berlin, 1872. The text of it is reprinted in his and Krueger's edition of the *Corpus Juris*, not yet completed.
- DIRKS. MANUALE = *Manuale Latinitatis Fontium Juris Civilis . . . auct. Henr. Ed. Dirksen, Berolini*, 1837. Dirksen died 1868.
- DU TILLET = The *editio princeps* of Ulpian, *cura Jo. Tilius, Parisiis*, 1549. I have not been able to consult this edition, but have used the still rarer one published *Patavii*, 1554, which I understand is a literal reproduction.
- EPHEM. EPIGRAPH. = *Ephemeris Epigraphica*, a periodical supplement to the Berlin *Corpus Inscriptionum Latinarum*, published by the Archæological Institute in Rome, vols. i-iv, 1872-79.
- EPIT. = The Epitome of Gaius, sometimes called the West Gothic Gaius, preserved in the *Breviarium Alaricianum* of 506. It has been often published separately, and is to be found in several of the Gothofredan editions of the *Corpus Juris*, and in Schulting's, Hugo's, and other collections of ante-Justinian law.
- FEST. = *Sexti Pomp. Festi de Verborum Significatione quae supersunt, cum Pauli epitome*. The best edition is Mueller's, Leipzig, 1839; but there is a good selection of passages illustrative of legal antiquities in Bruns, *Fontes etc.*
- X FR. DE JURE FISCO = *Fragmentum de jure fisci*, of the end of the second or beginning of the third century, discovered by Niebuhr at Verona at the same time as the ms. of Gaius. It will be found in Huschke's, Krueger's, and other ante-Justinian collections.
- X FR. DOS. = *Fragmentum Regularum incerti auctoris, Cervidii Scaevola ut videtur, a Dositheo servatum*, in Huschke's, Krueger's, and other collections.
- X FRONT. DE CONTROV. = *Julii Frontini de controversiis agrorum libri II*. Frontinus

- flourished about 80 or 90 A.D. I have used the edition in *Die Schriften der roem. Feldmesser*, by Blume, Lachmann, and Rudorff, 2 vols., Berlin, 1848, 1852.
- FR. VAT. = the so-called Vatican Fragments, dating from about 430, published by Cardinal Mai in 1823, from a MS. in the Vatican library. There is a fac-simile, with notes, by Mommsen, in the Transactions of the Royal Academy of Berlin for 1859. The text is in Huschke's and other collections of ante-Justinian law; and Mommsen promises a new edition for that of Krueger, etc. X
- G. or GOESCH. = Goeschen's editions of Gaius, 1820 and 1824. He died in 1837, and his papers were used by Lachmann for the edition of 1842.
- GOV. = *Kritische Aanteekeningen op Gajus*, critical notes on Studemund's revision, by J. E. Goudsmit, Professor in Leyden. Leyden, 1875.
- HAENEL, CORP. LEG. = *Corpus Legum ab Imperatoribus Romanis ante Justinianum latarum, quae extra Constitutionum Codices supersunt* . . . *Instruxit Gustavus Haenel, Lipsiae*, 1857.
- HE. = Heffter's (A. G.) edition of the Fourth Book of Gaius, Berlin, 1827.
- HEIMBACH, CREDITUM = *Die Lehre von dem Creditum*, by Gustav Ernst Heimbach, Leipzig, 1849.
- HEINECC. AD L. JUL. = *Jo. Gottl. Heineccii ad legem Juliam et Papiam Poppaeam Commentarii*. I have used the edition of Amsterdam, 1731. Heineck died in 1741.
- HOLLWEG : see BETHMANN-HOLLWEG.
- HU. (in notes to Gai.) = Huschke's (Phil. Eduard) editions of Gaius, and particularly his *editio separata tertia*, revised after Studemund's Apograph, Leipzig, 1878.
- HU. (in notes to Ulpian) = Huschke's edition of Ulpian in his *Jurisprudentia Ante-justiniana*.
- HU. BEITR. = Huschke's *Gaius : Beitrage zur Kritik und zum Verstaendnisse seiner Institutionen*, Leipzig, 1855.
- HU. J. A. = Huschke's *Jurisprudentiae Antejustinianae quae supersunt*, 4th edition, Leipzig, 1879.
- HU. MULTA = Huschke's *Die Multa und das Sacramentum in ihren verschiedenen Anwendungen*, Leipzig, 1874.
- HU. NEXUM = Huschke *Ueber das Recht des Nexum und das alte roemische Schuldrecht*, Leipzig, 1846.
- HU. STUDIEN = Huschke's *Studien des roemischen Rechts*, Breslau, 1830.
- HUGO (in notes to Ulp.) = Hugo's (Gustav) editions of Ulpian, particularly that of Berlin, 1834. Hugo died 1844.
- HUGO, J. C. A. = *Jus Civile Antejustinianum* . . . *a societate jurisconsultorum curatum, edente Gustavo Hugo*, in 2 vols., Berlin, 1815.
- I. or INST. = The Institutes of Justinian; best editions those of Krueger and Huschke. X
- IHERING, G. D. R. R. = *Geist des roemischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, by Rudolph von Ihering, Prof. in Vienna, 3d edition, 4 vols., Leipzig, 1873. There is a French translation by Meulenaere, under the title of *L'Esprit du Droit Romain*, 4 vols., Paris, 1878.
- INST. GLOSS. TAUR. = The Turin Gloss of Justinian's Institutes, in Savigny's *Geschichte*, ii, 428, and (by Krueger) in *Z. f. RG.* vii, 44. X
- JAHRB. D. G. R. = *Jahrbuch des gemeinen deutschen Rechts*, by Bekker, etc., 6 vols., Leipzig, 1857-63.

- K. (or KR., in notes to Gai.) = Krueger's notes in his and Studemund's edition of Gaius ; see K. u. S.
- K. (or KR., in notes to Ulp.) = Krueger's notes to his edition of Ulpian in his *Coll. libr. jur. Antej.* ; see KR. J. A.
- K. u. S. = Krueger and Studemund's edition of Gaius after the latter's Apograph, with an *epistula critica* by Mommsen, Berlin, 1877.
- KARLOWA, R. CP. = *Der roemische Civilprozess zur Zeit der Legislationen*, by O. Karlowa, Prof. in Heidelberg, Berlin, 1872.
- KELLER, LITISCONTESTATION = *Litiscontestation und Urtheil nach classischem roemischem Recht*, by Fried. Ludw. von Keller, Zurich, 1827. Keller died 1860.
- KELLER, R. CP. = *Der roemische Civilprozess und die Actionen*, by F. L. von Keller, 5th edition, by Adolf Wach, Leipzig, 1877.
- KR. J. A. = Krueger's *Collectio librorum Juris Antejustiniani*, now in course of publication, in co-operation with Mommsen and Studemund.
- KRUEGER, KRIT. VERS. = Krueger's *Kritische Versuche im Gebiete des roemischen Rechts*, Berlin, 1870.
- KUNTZE R.R. = *Institutionen und Geschichte des roemischen Rechts*, by Joh. Emil Kuntze, Prof. in Leipzig, 2 vols., Leipzig, 1869.
- L. (in notes to Gai.) = Lachmann (Karl), in his edition of 1842.
- L. (in notes to Ulp.) = Lachmann's *Kritischer Beitrag zu Ulpian's Fragmenten*, in *Z. f. g. RW.*, ix, 174.
- LANGE, ROEM. ALT. = Lange's (Ludwig) *Roemische Alterthuemer*, 2d ed., 3 vols., Berlin, 1863-71.
- LEX BURGUND. = *Lex Romana Burgundionum, circa 520* ; last edition by Aug. Fried. Barkow, Greifswald, 1826.
- M. (in notes to Gai.) = Mommsen's observations in his introductory *epistula critica* and in the footnotes to Krueger's edition of 1877.
- M. (in notes to Ulp.) = Mommsen's observations in Boecking's edition of 1855.
- M. u. M. ROEM. ALT. = *Handbuch der Roemischen Alterthuemer*, by Joachim Marquardt and Theodor Mommsen, Berlin, 1871-78. Volumes 1-3, dealing with the *Staatsrecht* (the 3d not yet published), are by Mommsen ; vols. 4-6, dealing with the *Staatsverwaltung*, by Marquardt. A 7th vol., also by Marquardt, will deal with the *Privatleben*.
- MEERM. THES. = Meerman's (G.) *Novus Thesaurus Juris Civilis et Canonici*, in 7 vols., published at the Hague in 1751-53 ; and a supplemental volume by his son, J. L. B. Meerman, in 1780.
- MOMMS. ROEM. FORSCH. = Mommsen's *Roemische Forschungen*, 2 vols., Berlin, 1864, 1879.
- MOMMS. STADTR. VON SALPENSA, ETC. = *Die Stadtrechte der lateinischen Gemeinden von Salpensa und Malaga*, edited by Mommsen in the Transactions of the Royal Society of Sciences of Saxony, Philologico-Historical Series, vol. ii, (1857).
- X NOV. = Justinian's Novels (*Novellae Constitutiones*), in most editions of the *Corpus Juris*.
- OELL. AND HENZ. = *Inscriptionum Latinarum Collectio*, the first two vols. by Jo. Caspar Orelli, Zurich, 1828, the third by Henzen, Zurich, 1856.
- OTTON. THESAUR. = Otto's (Everard) *Thesaurus Juris Romani*, 5 vols., Utrecht, 1733-35.



- P. = *Gai Institutiones Jur. Civ. secundum Guilelmi Studemund collationem . . . . appositis Justiniani Institutionibus . . . edidit B. J. Polenaar, Lugd. Bat. 1876-79.*
- PAUL. = *Julii Pauli Sententiarum ad filium libri V.* Paulus was a contemporary of Ulpian's; his Sentences will be found in Huschke's, Krueger's, and other collections of ante-Justinian law. X
- PAUL. DIAC. : see FEST. above.
- PAUL. EX FESTO : see FEST. above.
- PERNICE = *Marcus Antistius Labeo : das Roemische Privatrecht im ersten Jahrhunderte der Kaiserzeit*, by Dr. Alfred Pernice, Professor in Halle, 1st and 2d vols., Halle, 1873, 1878.
- PETRA, TAVOLETTE = *Le Tavolette cerate di Pompei*,—a series of wax-tablets recording the business transactions of an auctioneer, discovered in Pompeii in 1875, published in 1877 by Prof. Giulio de Petra, Director of the Museum at Naples.
- REV. DE LEGISLAT. = *Revue de Législation ancienne et moderne*, by Laboulaye, De Rozière, etc., 6 vols., Paris, 1870-76.
- ROEDER = *Versuche der Berichtigung von Ulpiani Fragmenta*, by Karl Dav. Aug. Roeder, Goettingen, 1856.
- RUDORFF, EDICT. = *Edicti Perpetui quae reliqua sunt, constituit, adnotavit, edidit Adolfus Frid. Rudorff, Lipsiae*, 1869.
- RUDORFF, R. RG. = *Roemische Rechtsgeschichte*, by A. F. Rudorff, 2 vols., Leipzig, 1857. Rudorff died in 1873.
- SAV. G. D. R. R. = *Geschichte des Roemischen Rechts im Mittelalter*, by Fried. Carl von Savigny, 2d edition, 7 vols., Heidelberg, 1834-51. The illustrious author died in 1861. X
- SAV. OBL. = *Das Obligationenrecht als Theil des heutigen roemischen Rechts*, by the same author, 2 vols., 1851, 1853. This is in continuation of his *System*, but is unfortunately incomplete. X
- SAV. SYST. = *System des heutigen roemischen Rechts*, by the same author, 8 vols., Berlin, 1840-49. This is the first part of his contemplated *System*, and contains the general doctrines. X
- SAV. VERM. SCHR. = *Vermischte Schriften*, by the same author, 5 vols., Berlin, 1850.
- SCHEURL, BEITR. = *Beitraege zur Bearbeitung des roemischen Rechts*, by Ch. G. Adolf von Scheurl, Professor in Erlangen, Erlang. 1853.
- SCHILL. ANIMADV. = *Animadversiones criticae ad Ulpiani Fragmenta*, by Fried. Ad. Schilling, 4 parts, Leipzig, 1830, 1831. Schilling died 1865.
- SCHILL. BEMERK. = *Bemerkungen ueber roemische Rechtsgeschichte*, by the same author, Leipzig, 1829.
- SCHOELL, TAB. = *Legis Duodecim Tabularum reliquiae*, by Rudolf Schoell, Leipzig, 1866. It has been followed by Bruns in the version of the Twelve Tables given by him in his *Fontes*.
- SCHMIDT, INTERD. = *Das Interdiktenverfahren der Roemer*, by Karl Adolf Schmidt, Leipzig, 1853.
- SCHULT. = Schulting's (Anton.) edition of Ulpian in his *Jurisprudentia vetus Antejustiniana*, Lugd. Bat. 1717. Schulting died 1734.
- SERV. IN VIRGIL. = *Commentarii in Virgilium Mauri Servii Honorati*. Servius flourished about 420. I have used the edition by Lion, 2 vols., Goettingen, 1826.

TH. (or THEOPH. PAR.) = Theophilus' Greek Paraphrase of Justinian's Institutes, almost contemporary with them. The best edition is that by Reitz, published at the Hague in 1751.

✕ ULP. = *Ulpiani Fragmenta* or *Excerpta ex Ulpiani Libro singulari Regularum*.  
 ✕ ULP. INST. = Fragments from Ulpian's Institutions in Huschke's, Krueger's, and other collections of ante-Justinian law.

VAHLEN = his edition of Ulpian, Bonn, 1856.

✕ VALER. PROB. = *M. Valerii Probi de juris civilis notarum significatione commentarius*. Probus flourished in the reign of Nero. The authoritative edition is that of Mommsen in Keil's collection of the latin grammarians, (vol. iv, p. 971, Leipz. 1864). The *Notae* will also be found in Huschke's, Krueger's, and other collections of ante-Justinian law.

VANG. LAT. JUN. = *Ueber die Latini Juniani*, by Carl Adolph von Vangerow, Marburg, 1833. Vangerow died 1870.

VOIGT, JUS NAT. = *Das Jus Naturale, Aequum et bonum, und Jus gentium der Roemer*, by Moritz Voigt, 4 vols., Leipzig, 1856-75.

VOIGT, BEDEUTUNGSWECHSEL = *Ueber den Bedeutungswechsel gewisser die Zu-rechnung . . . bezeichnender lateinischer Ausdruecke*, by the same author, in the Trans. Roy. Society of Sciences of Saxony, Phil.-Hist. Series, vol. vi, (1872).

Z. F. G. RW. = *Zeitschrift fuer geschichtliche Rechtswissenschaft*, by Savigny, Goeschen, Rudorff, etc., 15 vols., Berlin, 1815-50.

Z. F. RG. = *Zeitschrift fuer Rechtsgeschichte*, by Rudorff, Bruns, etc., 13 vols., Weimar, 1861-78.

G A I I  
INSTITUTIONUM JURIS CIVILIS  
COMMENTARII IV  
EDITIO AD STUEMUNDI APOGRAPHUM  
CURATA.





# GAII INSTITVTIONVM IVRIS CIVILIS COMMENTARII QVATTVOR.

## [COMMENTARIVS PRIMVS.]

1 (*Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum iure utuntur: nam (quod) quisque populus ipse sibi ius constituit, id ipsius proprium est uocaturque ius ciuile, quasi ius proprium ciuitatis; quod uero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur uocaturque ius gentium, quasi quo iure omnes gentes utuntur. populus itaque Romanus partim suo proprio, partim communi omnium hominum iure utitur. quae singula qualia<sup>1</sup> sint, suis locis proponemus.*

1 *All peoples that are under the government of laws and customs use in part their own law, in part what is common to mankind; for what each people has established on its own account is peculiar to itself, and is called its civil law, in the sense of being the proper law of the particular state or ciuitas; whereas what its natural reasonableness has caused to be received by mankind generally is observed by all peoples alike, and is called the law of nations,—that, as it were, which all nations make use of. The Roman people, therefore, employs a body of law which is partly its own, partly common to all men. What each branch includes will be explained in due course.*

§§ 1–8. Comp. tit. I. *DE IVRE NATVRALI, GENTIVM, ET CIVILI* (i. 2). In the ms. before § 1, is the rubric—*I. De iure ciuili et naturali*, in a later hand.

§ 1. § 1, tit. I. afd. First three lines

of par. illegible; supplied from Gai. (*lib. i. Inst.*) in fr. 9, *D. de I. et I.* (i, 1).

<sup>1</sup> Stud. thinks *qualia* erroneous; P. has *quaenam*.

- 2 Constant autem iura<sup>1</sup> populi Romani ex legibus, plebiscitis, senatusconsultis, constitutionibus principum, edictis eorum  
 3 qui ius edicendi habent, responsis prudentium. Lex est quod populus iubet atque constituit. Plebiscitum est quod plebs iubet atque constituit. plebs autem a populo eo distat, quod populi appellatione uniuersi ciues significantur, connumeratis etiam patriciis; plebis autem appellatione sine patriciis ceteri ciues significantur; unde olim patricii dicebant plebiscitis se non teneri, *quia*<sup>1</sup> sine auctoritate eorum facta essent; sed postea lex Hortensia<sup>2</sup> lata est, qua cautum est ut plebiscita uniuersum populum tenerent: itaque eo modo legibus exae-

- 2 The laws of the Roman people are the product of *leges* [*i.e.* comitial enactments], plebiscits, senatusconsults, imperial constitutions, edicts of those enjoying the *ius edicendi*, and  
 3 responses of the jurists. A *lex* is a law enacted and established by the whole body of the people; a plebiscit, one enacted and established by its plebeian members. The difference between *plebs* and *populus* is this,—that the latter denotes the whole mass of the citizens, patricians included, whereas the former denotes only the citizens who are not patricians. It was because of this distinction that of old the patricians maintained that plebiscits were not binding upon them, because enacted without their authorisation. But in course of time the Hortensian law was passed, declaring that plebiscits should be of force universally; and thus they were put

§ 2. Comp. § 3, tit. I. *afid.*

<sup>1</sup> *Constant autem iura* in the MS.; Hu. prefers *constat autem ius civile*.

§ 3. Comp. § 4, tit. I. *afid.*

<sup>1</sup> Instead of *quia* P. prefers *quae*; the MS. has *q'*, which does not appear to occur elsewhere as a contraction of either word.

<sup>2</sup> The *lex Hortensia* was enacted 467 | 287; comp. Plin. *H. N.* xvi, 10; Gell. xv, 27, § 4. On the *L. Valeria Horatia*, 305 | 449, (Liv. iii, 55,) and *L. Publilia Philonis*, 415 | 339, (Liv. viii, 12,) which at first sight appear to have long before introduced the same change as the *L. Hortensia*, see Mommsen, *Roem. Forsch.*, vol. I, pp. 163-6, 200-1, 215-17. He distinguishes between the *comitia tributa* and the *concilium plebis*, holding that the enact-

ments of the former were always called *leges*, and only those of the latter called *plebiscita*. According to his view, the *L. Val. Horatia* created the *comitia tributa*, while the *L. Publilia* endowed it with the capacity to legislate under the presidency and on the proposal of the praetor; the *L. Hortensia*, on the other hand, referred to the *concilium plebis*, and declared that its enactments should for the future be binding on the citizens generally, without the necessity of approval by the *patres*. (For he argues that exceptionally, and with that approval, as in the case of the *lex Canuleia*, 309 | 445, a plebiscit sometimes did have the effect of a *lex* even before the *L. Hortensia*; a view which so far justifies Polenaar's reading *quae* above referred to.)

4 quata sunt. Senatusconsultum est quod senatus iubet atque  
constituit, idque legis uicem optinet, quamuis fuerit quaesitum.  
5 Constitutio principis est quod imperator decreto<sup>1</sup> uel edicto<sup>1</sup>  
uel epistula<sup>1</sup> constituit. nec umquam dubitatum est quin id  
legis uicem optineat, cum ipse imperator per legem<sup>2</sup> imperium  
6 accipiat. Ius autem edicendi habent magistratus populi  
Romani. sed amplissimum ius est in edictis duorum praeto-  
rum, urbani<sup>1</sup> et peregrini,<sup>2</sup> quorum in prouinciis iurisdictionem  
praesides earum habent; item in edictis aedilium curulium,<sup>3</sup>

4 on a par with *leges*. A senatusconsult is a law enacted and  
established by the senate, and, although at one time doubted,  
5 has all the force of statute. An imperial constitution is  
what the emperor has established by decree, edict, or letter. It  
has never been disputed that such a constitution has the full  
force of a *lex*; for it is by a *lex* that the emperor is invested  
6 with the *imperium*. The *ius edicendi* [or right to publish  
edicts] is an attribute of the magistrates of the Roman people.  
Nowhere has it a more ample exponent than in the edicts of  
the two praetors, the urban and the peregrin, whose jurisdic-  
tion is exercised in the provinces by the provincial governors;  
as also in that of the curule aediles, whose jurisdiction is

§ 4. Comp. § 5, tit. I. afd.

§ 5. Comp. § 6, tit. I. afd.

<sup>1</sup> *Decretum* was a decision given by the emperor on a question brought before him judicially; *edictum*, a law formally promulgated; *epistula*, a declaratory statement of the law in answer to an application either from an official or a private party, usually called a *rescriptum*.

<sup>2</sup> See the *Lex de imperio Vespasiani*, in Bruns, *Fontes*, p. 118; Tac. *Hist.* iv, 3.

§ 6. Comp. § 7, tit. I. afd. One would have expected here a definition of the *edicta magistratum*, and possibly it has been accidentally omitted by the transcriber; Hu. interpolates—*Edicta sunt praecepta eorum qui ius edicendi habent*.

<sup>1</sup> The urban praetorship was created as an immediate consequence of the *leges Licinae* of 387 | 367 (opening the consulate to the plebeians,) and with the view of keeping

the administration of the law in the hands of the patricians. See Liv. vi, 42; Pompon. in fr. 2, § 27, D. *de O. I.* (i, 2). This magistrate is referred to in various old laws as *praetor qui inter ciues ius dicit*.

<sup>2</sup> The peregrin praetorship was created in or about the year 507 | 247; the duty of the new magistrate being to administer justice between foreigners resident in Rome, or between foreigners and citizens. See Liv. Epit. xix; fr. 2, § 28, D. *de O. I.* (i, 2).

<sup>3</sup> The curule aediles were first created at the same time as the urban praetor. Amongst their various functions they had the oversight and regulation of the slave and cattle markets, with jurisdiction in questions arising out of market transactions. See Liv. vi, 42; Mommsen, in M. u. M. *Roem. Alt.* ii, 470.



quorum iurisdictionem in prouinciis populi Romani<sup>4</sup> quaestores habent; nam in prouincias Caesaris<sup>4</sup> omnino quaestores non mittuntur, et ob id hoc edictum in his prouinciis non pro-  
 7 ponitur. Responsa prudentium sunt sententiae et opiniones eorum quibus permissum est iura condere. quorum omnium si in unum sententiae concurrunt, id quod ita sentiunt legis uicem optinet; si uero dissentiunt, iudici licet quam uelit sententiam sequi; idque rescripto diui Hadriani significatur.

8 Omne autem ius quo utimur<sup>1</sup> uel ad personas pertinet, uel ad res, uel ad actiones. sed<sup>2</sup> prius uideamus de personis.

9 Et quidem summa diuisio de iure personarum haec est, quod  
 10 omnes homines aut liberi sunt aut serui. Rursus liberorum  
 11 hominum alii ingenui sunt, alii libertini. Ingenui sunt qui

exercised in the popular provinces by the quaestors: (there are no quaestors sent to the imperial provinces, where, con-  
 7 sequently, the aedilitian edict is not propounded). The responses of the jurisconsults are the decisions and opinions of individuals licensed to lay down the law. If those consulted be unanimous, their decision or opinion has the force of statute; but if they differ, the judge may adopt any of their opinions he pleases; so it is declared in a rescript of our late emperor Hadrian's.

8 The whole body of law in use amongst us relates either to persons, things, or actions. Let us first turn our attention to persons.

9 The primary division of the law of persons is this,—that all  
 10 men are either free or slaves. Of freemen again some are  
 11 *ingenui* and others *libertini*. *Ingenui* are those that have

<sup>4</sup> Comp. ii, 21. The division of the provinces into popular and imperial was due to Augustus; after the third century they were all imperial.

§ 7. Comp. § 8, tit. I. afd.; Th. i, 2, § 8.

§ 8. This par. is preceded in the ms. by the rubric, in a later hand,—II. *De iuris diuisione*. Gai. in fr. 1, D. *de stat. hom.* (i, 5); § 12, tit. I. afd.

<sup>1</sup> It is a question how the phrase *omne ius quo utimur* is to be understood: it may be rendered either as above, or as 'Every right exercised by us.'

<sup>2</sup> The ms. has *sed*; K. u. S. and Hu. read *et*.

§§ 9-12. Preceded in the ms. by marginal rubric, in a later hand,—III. *De conditione hominum*.

§§ 9-10. Comp. tit. I. *DE IVRE PERSONARVM* (i, 3).

§ 9. Gai. in fr. 3, D. *de stat. hom.* (i, 5); pr. tit. I. afd.

§ 10. Comp. § 5, tit. I. afd.

§§ 11-35. Comp. tit. I. *DE INGENVIS* (i, 4) and *DE LIBERTINIS* (i, 5).

§ 11. Comp. pr. I. *de ingen.* and pr. *de libert.*

- liberi nati sunt; libertini, qui ex iusta servitute manumissi  
 12 sunt. Rursus libertinorum [*tria sunt genera: nam aut ciues  
 [Romani aut latini aut dediticiorum]* numero sunt. de quibus  
 singulis dispiciamus; ac prius de dediticiis.
- 13 Lege itaque Aelia Sentia<sup>1</sup> cauetur, ut qui serui a dominis  
 poenae nomine uincti sint, quibusue stigmata inscripta sint,  
 deue quibus ob noxam quaestio tormentis habita sit et in  
 ea noxa fuisse conuicti sint, quique ut ferro aut cum bestiis  
 depugnarent traditi sint, inue ludum custodiamue coniecti  
 fuerint, et postea uel ab *eodem*<sup>2</sup> domino uel ab alio manumissi,  
 eiusdem condicionis liberi fiant cuius condicionis sunt per-  
 14 egrini dediticii. Vocantur autem [*peregrini dediticii*]<sup>1</sup> hi  
 qui quondam aduersus populum Romanum armis suscep-  
 15 tis pugnaverunt, deindi uicti se dediderunt. Huius ergo

been born free; *libertini* those manumitted from lawful slavery.

- 12 Again, of *libertini* or freedmen there are three classes; for they  
 may be either Roman citizens, or latins, or classed with the *dediti-*  
*cians*. Let us deal with these separately, beginning with the last.
- 13 By the Aelia-Sentian law it is provided in regard to slaves  
 who have been put in chains or branded by their masters by  
 way of punishment, or who have been put to the torture on  
 account of some offence of which they have eventually been  
 convicted, or who have been given up to fight in the arena  
 either with men or beasts, or who have been committed either  
 to a gladiatorial training school or to prison, that if afterwards  
 they be manumitted either by the owner who has thus dealt  
 with them or by a later one, they shall as freemen be of the  
 14 same condition as the *peregrini dediticii*. Those are called  
*peregrini dediticii* who, having taken up arms and made war  
 against the Roman people and been vanquished, have after-  
 15 wards unconditionally surrendered. Slaves disgraced in any

12. Comp. Vlp. i, 5; Fr. Dos. §§ 4 f.  
 The words in ital. are supplied by  
 G. from the Epit., and adopted by  
 all eds.

§ 13. A rubric interlineated—*IIII. De  
 dediticiis uel lege Aelia Sentia*.  
 Comp. Sueton. Aug. 40; Dio  
 Cass. iv, 13; Vlp. i, 11; Paul. iv,  
 12, §§ 3, 5-8; Th. i, 5, § 3.

<sup>1</sup> The *lex Aelia Sentia*, enacted  
 757 | 4, contained a body of regula-  
 tions on the subject of enfranchise-  
 ments, and was intended to restrain

that immoderate resort to them  
 from motives of ostentation that had  
 been flooding the state with citizens  
 of slave origin.

<sup>2</sup> So G. and most eds.; the ms.  
 has *eo*.

§ 14. Rubric interlineated—*V. De pere-*  
*grinis dediticiis*. Comp. Liv. i, 38;  
 Th. i, 5, § 3.

<sup>1</sup> These words are on the margin  
 of the ms., in a later hand.

§ 15. Comp. i, 26.

- turpitudinis seruos quocumque modo et cuiuscumque aetatis manumissos, etsi pleno iure<sup>1</sup> dominorum fuerint, numquam aut ciues Romanos aut latinos fieri dicemus, sed omni modo
- 16 dediticiorum numero constitui intellegemus. Si uero in nulla tali turpitudine sit seruus, manumissum modo ciuem Ro-
- 17 manum, modo latinum fieri dicemus. nam in cuius persona tria haec concurrunt, ut maior sit annorum triginta, et ex iure Quiritium domini, et iusta ac legitima manumissione<sup>1</sup> liberetur, id est uindicta<sup>2</sup> aut censu<sup>3</sup> aut testamento,<sup>4</sup> is ciuis Romanus fit; sin uero aliquid eorum deerit, latinus erit.
- 18 Quod autem de aetate serui requiritur lege Aelia Sentia introductum est. nam ea lex minores xxx annorum seruos non aliter uoluit manumissos ciues Romanos fieri, quam si uindicta, apud consilium, iusta causa manumissionis adpro-
- 19 bata, liberati fuerint. Iusta autem causa manumissionis

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of the ways described, no matter how or at what age they may have been manumitted, and even though their manumitter may have held them in full ownership [*i.e.* both bonitarian and quiritarian], can never become either Roman citizens or latins, but must ever be classed as dediticians.

- 16 If, however, no such disgrace attach to a slave, he becomes on manumission sometimes a Roman citizen, sometimes a
- 17 latin. He becomes a Roman citizen in whose person these three requisites concur,—that he is above thirty years old, that he is held by his owner on quiritarian title, and that he is freed by a legally recognised mode of manumission, *i.e.* by *vindicta*, census, or testament; if any of these requisites fail he will be a latin.
- 18 The requirement as to the age of the slave was introduced by the Aelia-Sentian law, which declared that slaves manumitted under the age of thirty should not become Roman citizens unless their manumission were *vindicta*, and upon
- 19 adequate cause approved by the council. There is such

<sup>1</sup> *Pleno iure* means both *in bonis* and *ex iure Quiritium*; comp. i, 54; ii, §§ 40, 41. The difference between these two terms is explained in ii, 40, note, and Vlp. i, 16.

§ 17. Comp. Vlp. i, §§ 6-10, 12, 16; Th. i, 5, § 4.

<sup>1</sup> Comp. Fr. Dos. § 5; also note to § 41.

<sup>2</sup> Comp. Boeth. in *Cic. Top.* i, 2, § 10 (Bruns, p. 294); Th. as above.

<sup>3</sup> Comp. Boeth. and Th. as in note 1.

<sup>4</sup> Comp. ii, §§ 224, 267; Vlp. i, 23; ii, 7; Th. as in note 1.

§ 18. Interlineation in MS.—*VI. De manumissione uel causae probatione.* Comp. Vlp. i, 12; Vlp. in fr. 16, pr. D. *de manum. uind.* (xl, 4); Fr. Dos. § 13.

§ 19. Comp. i, 39; § 5, I. *qui quib. ex caus.* (i, 6); Th. i, 6, § 5.

- est ueluti si quis filium filiamue aut fratrem sororemue naturalem,<sup>1</sup> aut alumnum, aut paedagogum,<sup>2</sup> aut seruum procuratoris habendi gratia, aut ancillam matrimonii causa apud
- 20 consilium manumittat. Consilium<sup>1</sup> autem adhibetur in urbe Roma quidem quinque senatorum et quinque equitum Romanorum puberum; in prouinciis autem uiginti recuperatorum ciuium Romanorum. idque fit ultimo die conuentus;<sup>2</sup> sed Romae certis diebus apud consilium manumittuntur. maiores uero triginta annorum serui semper manumitti solent,<sup>3</sup> adeo ut uel in transitu manumittantur, ueluti cum praetor aut proconsul<sup>4</sup> in balneum uel in theatrum eat.
- 21 Praeterea minor triginta annorum seruus manumissus potest

- adequate cause when, for instance, in presence of the council, a man manumits his natural child, brother, or sister, or his foster-child, his children's instructor, a slave that he means to make his procurator, or a woman-slave whom he means to
- 20 marry. The council consists in Rome of five senators and five Roman knights of the age of puberty; in the provinces of twenty recuperators, Roman citizens. It is held in the provinces on the last day of the assize; but in Rome there are certain fixed days for council manumissions. But slaves above thirty may be manumitted at any time, even *en route*, as when the praetor or a proconsul is on his way to the bath or the theatre.
- 21 A slave under thirty at manumission may become a Roman

<sup>1</sup> The phrase *filius naturalis* is used in the texts to indicate sometimes a child by birth as distinguished from adoption, sometimes a child by a mistress or a slave, as distinguished from a lawful wife.

<sup>2</sup> This word is used in different senses here and in § 39; in the one place, as by Vlp. in fr. 13, D. *de manum. uind.* (xl, 4), it may mean the manumitter's own teacher; in the other, as by the same Vlp. in fr. 35, D. *de fideic. lib.* (xl, 5), his children's.

§ 20. Interlineated rubric — VII. *De concilio adhibendo.*

<sup>1</sup> Comp. Vlp. i, 13; Th. i, 6, § 4.

<sup>2</sup> The provinces in the time of Gaius were divided into districts (*iuridici conuentus, iurisdictiones*); and in winter the governor made his circuit, holding an assize at the principal town of each. This assize

also got the name of *conuentus*, and the same word was used as a collective appellation for the individuals — Roman citizens settled in the province—who were qualified to act as jurymen, and required to attend (*conuentus ciuium Romanorum*). See Th. as in note 1.

<sup>3</sup> Comp. § 2, I. *de libertin.* (i, 5).

<sup>4</sup> The ms. and most eds. have *pro consule*; but see iv, 139.

§ 21. Comp. ii, 154; Vlp. i, 14; § 1, I. *qui quib. ex caus.* (i, 6). The last line of p. 4 of the ms. is legible, but not very comprehensible; p. 5, with exception of a few isolated words, is undecipherable. Momms. (K. u. S. footnote) suggests as the completion of the sentence begun on p. 4—*alius heres nullus excludit; idque eadem lege Aelia Sentia cautum est*. This does not correspond with the few letters decipherable in the ms., but



ciuis Romanus fieri, si ab eo domino qui soluendo non erat  
testamento eum liberum et *heredem relictum* — — — —

21b — — — —. [21b] — — — — — — — —.

citizen if his insolvent owner have by testament both  
given him his freedom and instituted him as heir, [*provided*  
[*no similar institution of another slave precede his, and no*  
[*other person voluntarily accept the inheritance under the*  
[*will; so it was enacted by the same Aelia-Sentian law. Out*  
[*of a regard for freedom the rule will apply, according to*  
[*Proculus, even though the slave thus instituted heir have no*  
21a [*express grant of liberty. In conformity with the declaration*  
[*of the Aelia-Sentian law that it is only the slave first thus*  
[*instituted in a testament that is to be free, it has been ruled that*  
[*if a man institute as his heirs with freedom all his bastard*  
[*children by a certain slave-woman of his, none of them will be*  
[*free; for neither is it possible in such a case to say which of*  
[*them is instituted first, nor ought the deceased's creditors to be*  
[*defrauded by the withdrawal of so many slaves from his insolvent*  
[*estate; and a senatusconsult, passed to amend the Fufia-Can-*  
[*inian law, declares null and void any device resorted to by a*  
21b [*testator to defeat the provisions of the statute.*] [21b] — —

22 [Under the Aelia-Sentian law a slave under thirty, manu-  
[mitted either by testament or, on cause shown, among friends,  
[becomes a latin, (although it can hardly be said that it is to that  
[law that his name of latin is due); so does a slave over thirty,  
[if manumitted by an owner who had him only in bonis (even  
[though the manumission may have been in solemn form); or if

no doubt accurately expresses the  
idea. Hu. (footnote) suggests—  
*seruus similiter cum libertate heres*  
*scriptus testamento non praecedat, et*  
*nemo alius ex eo testamento heres*  
*sit; idque eadem lege Aelia Sentia*  
*cautum est. idem favore libertatis*  
*de eo seruo Proculus existimat, qui*  
*sine libertate heres scriptus sit.*

§§ 21a, 21b. The same ed. conjectures that  
the continuation of p. 5 may have  
run as follows (the words legible in  
the MS. being in roman type):—21a.  
*Cum uero lege Aelia Sentia testa-*  
*mento primus scriptus solus ciuis*  
*Romanus fiat, placuit, si quis forte*  
*ex ancilla sua natos spurios liberos*  
*et heredes scripserit, omnes seruos*  
*manere, quia quis primus sit ex ea*  
*oratione non intellegitur, nec in*  
*fraudem creditorum plures ex*

*patrimonio debent decedere; denique*  
*senatusconsulto ad legem Fufiam*  
*Caniniam facto prouisum est, ne in*  
*potestate debitoris esset eius legis*  
*auctoritatem per hanc artem euer-*  
*tere. 21b. Ex iure Quiritium fit*  
*seruus noster non per hoc solum*  
*quod pecunia nostra comparatur, sed*  
*ulterius requiritur iusta serui ac-*  
*quisitio propterea quod quaedam*  
*etiam non iustae sunt acquisitiones;*  
*nam ea, quae traditione alienantur,*  
*quamuis mancipi sint, nec uel manci-*  
*patione uel in iure cessione uel usu-*  
*cipatione acquiruntur, tantum in bonis*  
*fiunt. As authority for § 21a, Hu.*  
*refers to the Epit. i, 2, § 2; and for*  
*21b, to Gai. i, 35; ii, §§ 41, 204;*  
*Vlp. i, 16; Fr. Dos. § 9.*

§ 22. The commencement of this par.  
is on p. 5. Hu., founding on iii, 56;

22 — — — — — homines latini Iuniani appellantur ;  
latini ideo quia adsimulati sunt latinis coloniariis ;<sup>1</sup> Iuniani  
ideo, quia per legem Iuniam<sup>2</sup> libertatem acceperunt, cum olim  
23 serui uiderentur esse. Non tamen illis permittit lex Iunia

[manumitted amongst friends without cause shown, provided in  
[either case there be no other impediment. All these were for-  
[merly maintained in what had the semblance of freedom ; the  
[praetor giving them protection as freemen, though according to  
[quiritarian law they were still slaves. But now persons thus  
[manumitted] are called Junian latins : latins, because they are  
assimilated to the colonial latins ; Junian, because they owe  
their freedom to the Junian law, having been previously  
23 regarded as slaves. This law does not allow them either

Epit. i, 2, § 2 ; Vlp. i, §§ 10, 12 ;  
Fr. Dos. §§ 5, 6, reconstructs as  
follows :—*Latinus fit ex lege Aelia  
Sentia seruus minor XXX annorum  
qui testamento uel inter amicos causa  
probata liberatur, quanquam latin-  
um ipsa lex Aelia Sentia nondum  
fecit ; item qui ea aetate maior a  
domino, cuius est in bonis, quamuis  
iusta manumissione manumittitur,  
uel qui inter amicos liberatur, si  
modo alia causa libertatem non im-  
pediat. Hi omnes tamen olim qui-  
dem in forma libertatis seruabantur,  
cum praetor eos, licet serui ex iure  
Quiritium essent, in libertate tueretur.  
nunc uero hi homines, etc.*

<sup>1</sup> Comp. i, 131 ; iii, 56. On the  
nature of colonial latinity see  
Savigny, *Verm. Schr.* iii, 279 ; Mar-  
quardt in *M. u. M. Roem. Alt.* iv,  
47–57 ; Voigt, *Ius. Nat.* ii, pp.  
714–26, 738–45 ; Mommsen and  
Huebner on the *lex Coloniae Iul.  
Genetivae*, — the charter or act of  
incorporation of a Latin colony,  
founded by Julius Caesar at Urso,  
not far from Seville, and partially  
discovered on bronze tablets in the  
years 1871 and 1875, — in the *Ephem.  
Epigraph.* vol. ii, pp. 105–51, 221–  
32, vol. iii, pp. 91–112 ; Giraud on  
same law, under title of *Les Bronzes  
d'Osuna*, Par. 1874, *Les Bronzes  
d'Osuna, Remarques nouvelles*, Par.  
1875, and *Les nouveaux Bronzes  
d'Osuna*, Par. 1877. (The first  
reprinted portion of the law is re-  
printed by Bruns, under the title of  
*Lex Vrsonitana*, in his *Fontes*, p. 106.)

There is a good deal on the same  
subject in the writings of Berlanga,  
Mommsen, Huebner, Giraud, Van  
Swinderen, Van Lier, and others on the  
*Leges Malacitana et Salpensana*, —  
charters granted by Domitian to the  
*municipia* of Malaga and Salpensa,  
considerable portions of which, en-  
graved on bronze, were found near  
Malaga in the year 1851. They are  
included by Bruns in his *Fontes*,  
pp. 120, 124.

There is an interesting controversy  
on the question whether those *muni-  
cipia* were *municipia latina* or *mun.  
ciuium Romanorum* ; the former  
view is taken by most of the authors  
above named ; the latter by Zumpt  
in his *Studia Romana* (Berol. 1859),  
pp. 269 f., and by Houdoy, *Le droit  
municipal chez les Romains* (Paris,  
1876), pp. 76 f.

<sup>2</sup> Gai. always mentions this law  
simply as the *L. Iunia*, and so does  
Justinian in tit. C. *de lat. lib. toll.*  
(vii, 6) ; but in § 3, I. *de libertin.*  
(i, 5), and Th. i, 5, § 3, it is called  
*lex Iunia Norbana*. M. Junius  
Silanus and L. Norbanus Balbus  
were consuls in the year 772 | 19 ;  
and this date is usually assigned to  
the enactment. Mommsen, how-  
ever (*Jahrb. d. g. R.* ii, 338), and  
others, argue against both name and  
date, on the ground that comital  
legislation had by that time  
ceased.

§ 23. Comp. ii, §§ 110, 275 ; Vlp. xx,  
§§ 14, 15 ; xxii, 8 ; Fr. Vat. §  
172.

- uel ipsis testamentum facere, uel ex testamento alieno capere,  
 24 uel tutores testamento dari. Quod autem diximus ex testa-  
 mento eos capere non posse ita intellegemus, *ne quid inde*  
*directo*<sup>1</sup> hereditatis legatorumue nomine eos posse capere  
 dicamus; alioquin per fideicommissum capere possunt.  
 25 Hi uero qui dediticiorum numero sunt nullo modo ex testa-  
 mento capere possunt, non magis quam quilibet peregrinus;  
 quin nec ipsi testamentum facere possunt secundum id quod  
 26 *magis* placuit. Pessima itaque libertas eorum est qui dedi-  
 ticiarum numero sunt; nec ulla lege aut senatusconsulto aut  
 constitutione principali aditus illis ad ciuitatem Romanam  
 27 datur. Quin et in urbe Roma uel intra centesimum urbis  
 Romae miliarium morari prohibentur; et si *contra* fecerint,  
 ipsi bonaque eorum publice uenire iubentur ea condicione, ut  
 ne in urbe Roma uel intra centesimum urbis Romae miliarium  
 seruiant, neue umquam manumittantur; et si manumissi  
 fuerint, serui populi Romani esse iubentur. et haec ita lege  
 Aelia Sentia comprehensa sunt.

- 
- themselves to make a testament, or to take under that of  
 another person, or to be appointed testamentary tutors.  
 24 Our statement, however, that they cannot take under a testa-  
 ment, is to be understood as meaning that they cannot take  
 directly under it, either by way of inheritance or legacy; for  
 they may take by trust bequest.  
 25 Those, on the other hand, that are classed amongst the  
 dediticians, cannot, any more than any other peregrin, take in  
 any way under a testament; nor, according to the prevailing  
 26 doctrine, can they themselves make one. Their freedom,  
 therefore, is of the most miserable sort; nor can they ever,  
 either by law, senatusconsult, or imperial enactment, be  
 27 admitted to the privileges of Roman citizenship. Nay  
 more, they are forbidden to live in Rome or within the  
 hundredth milestone from the city. On contravention, they  
 themselves and their effects are ordered to be put up to public  
 sale for the benefit of the exchequer, and that under the con-  
 dition that they shall not be employed in Rome or within the  
 hundredth milestone, nor ever again be manumitted; if this  
 last condition be disregarded they become slaves of the  
 Roman people. All this was provided by the Aelia-Sentian law.
- § 24. Comp. ii, 275; Vlp. xxv, 7. which K. u. S. and Hu. change into  
*directo*.  
<sup>1</sup> *Inde directo* is an emendation of § 25. Comp. iii. 75; Vlp. xx, §§ 14,  
 Goudsmit's; the MS. reads *indirecto*, 15: xxii, 2.

- 28 Latini uero multis modis ad ciuitatem Romanam perueniunt.
- 29 Statimenim ex lege Aelia Sentia cautum est ut<sup>1</sup> minores triginta annorum<sup>2</sup> manumissi et latini facti, si uxores duxerint uel ciues Romanas uel latinas coloniarias uel eiusdem condicionis cuius et ipsi essent, idque testati fuerint adhibitis non minus quam septem testibus ciuibus Romanis puberibus, et filium procreauerint,<sup>3</sup> cum is filius anniculus<sup>4</sup> esse coeperit, datur eis potestas per eam legem<sup>1</sup> adire praetorem, uel in prouinciis praesidem prouinciae, et adprobare se ex lege Aelia Sentia uxorem duxisse et ex ea filium anniculum habere: et si is apud quem causa probata est id ita esse pronuntiauerit, tunc et ipse latinus<sup>5</sup> et uxor eius, si et ipsa eiusdem [*condicionis sit, et ipsorum filius si et ipse eiusdem*]<sup>6</sup> condicionis sit, ciues

- 28 Latins may attain to Roman citizenship in many ways.
- 29 Thus, by the Aelia-Sentian law it was provided that a slave who had been manumitted before attaining the age of thirty, and had thus become a latin, and who afterwards married a woman that was either a Roman citizen, or a colonial latin, or even of the same condition as himself, and had the fact attested by not fewer than seven witnesses, Roman citizens above puberty, called together for the purpose, and had a son born to him of the marriage, might, on said son's completing his first year, go before the praetor, or in a province before the governor, and prove that, in terms of the Aelia-Sentian law, he had married a wife and had by her a year-old son; and if the magistrate before whom cause had thus been shown pronounced accordingly, then the latin himself, his wife if she were of the same condition, *and their child if he also were of*

§§ 28-35. The matter of these pars. is introduced by a rubric, in a later hand, on a vacant line at foot of p. 6—*latini ad ciuitatem Romanam perueniant*. Probably it began with *Quibus modis*, but those words are no longer visible.

§ 29. Comp. Vlp. iii, 3. Gai. here and elsewhere attributes the provision referred to in this par. to the Aelia-Sentian law; as Vlp. explains, and as is probable from context, it was introduced by the Junian law. In § 80 Gai. speaks of the *lex Aelia Sentia et Iunia* as if the Junian were an amended version of the earlier enactment.

<sup>1</sup> P., K. u. S., and Hu. omit the words *cautum est ut* as a gloss; as does P. the *per eam legem* in the middle of the par.

<sup>2</sup> Comp. § 31.

<sup>3</sup> A daughter answered the purpose as well as a son; comp. §§ 32a, 72, and Vlp. iii, 3.

<sup>4</sup> See fr. 134, D. *de verb. sign.* (l, 16).

<sup>5</sup> After *latinus* what seems to be *Iunianus* is interlined; but only the termination (*anus*) is certain.

<sup>6</sup> The words in italics are not in the ms., but suggested by Goesch., and accepted by most editors as essential; see next par.

see h. 438 subst. note.



- 30 Romani esse iubentur. Ideo autem *in persona filii*<sup>1</sup> adiecimus ‘si et ipse eiusdem condicionis sit,’ quia si uxor latini ciuis Romana est, qui ex ea nascitur, ex nouo senatusconsulto quod auctore diuo Hadriano factum est, ciuis Romanus nascitur. Hoc tamen ius adipiscendae ciuitatis Romanae etiamsi *solii*<sup>1</sup> minores triginta annorum manumissi et latini facti ex lege Aelia Sentia habuerunt, tamen postea, senatusconsulto quod Pegaso et Pusione consulibus factum est, et maioribus triginta annorum manumissis latinis factis concessum est. Ceterum etiamsi ante decesserit latinus quam anniculi filii causam probauerit, potest mater eius causam probare, et sic et ipsa fiet ciuis Romana — — — — —.

- 30 *the same condition*, were declared to be Roman citizens. The reason why in reference to the son we add ‘if he also be of the same condition,’ is this,—that if the wife of a latin happen to be a Roman citizen, then, by a recent senatusconsult, of which our late emperor Hadrian was the author, any child born of the marriage will be a Roman citizen in right of birth.
- 31 Although by the Aelia-Sentian law it was only slaves manumitted and made latins under the age of thirty that were able to acquire Roman citizenship in the way described, yet afterwards, by a senatusconsult passed at the instance of the consuls Pegasus and Pusio, the same privilege was extended to those manumitted and made latins after attaining that age.
- 32 If a latin have died before proving his claim to citizenship on the strength of a year-old son, the mother may establish it, and so both herself become a Roman citizen [*and acquire that*

§ 30. Comp. § 80; Vlp. iii, 3. The senatusconsult here referred to seems to have been a very comprehensive one regulating birth-status; see § 67, note.

<sup>1</sup> So P.; Hu. and previous eds. have *in ipsorum filio*; K. u. S. *in huius persona*; the ms. is indistinct.

§ 31. Comp. § 29. Pegasus and Pusio were consuls in the reign of Vespasian (a. 70-79), but year unknown; see § 5, I. *de fideicom. hered.* (ii, 23).

<sup>1</sup> So Hu. and K. u. S.; the ms. has *socii*, but with a dot—equivalent to deletion—over some if not all of the letters.

§ 32. Comp. iii, 5; Paul. in *Collat.* xvi, 3, § 15. The last two words in the text, *ciuis Romana*, are the two first and only quite certain

words in the first line of p. 8 of ms.; lines 2-5 are more or less illegible. M. (K. u. S. p. xviii) proposes—*et sic et ipsa fiet ciuis Romana et filius, scilicet si latina sit. Si mater ante patrem decesserit uel post eum causa non probata, et spatium supersit, rem peraget per tutores ipse filius, cuiusque Romanus fiet; scilicet ita debet causam probare ut supra expositum est.* Hu. proposes—*et sic et ipsa fiet ciuis Romana, si latina est, et filius, isque tamquam iustis nuptiis procreatus, quasi suus postumus heres patris bona apiscitur. si uero et pater et mater decesserint, ipse filius, cuius interest cum ciuitate Romana bona consequi quae ab eis relicta sunt, debet causam probare, ut tamen pupilli tutor causam agat.*

32a *Quae supra diximus de filio anniculo, dicta intellegemus (etiam de filia annicula).*

32b — — — — — id est fiunt ciues Romani, si Romae inter uigiles sex annis militauerint. Postea dicitur factum esse senatusconsultum, quo data est illis ciuitas Romana si

32c triennium militiae expleuerint. Item edicto *Claudii latini* ius Quiritium consecuntur,<sup>1</sup> si nauem marinam aedificauerint, quae non minus quam decem milia modiorum<sup>2</sup> (*frumenti*)<sup>3</sup> capiat, eaque nauis, uel quae in eius locum substituta

33 (*sit, sex*)<sup>3</sup> annis frumentum Romam portauerit. Praeterea — — — — — ut, si Latinus qui patrimonium sestertium

[status for her child, that is to say if she herself be a latin. If she [have predeceased her husband, or died after him but before cause [has been shown, the son will proceed himself through his tutor, [and thus acquire citizenship; that is to say, he will show cause 32a [on his own account in the manner above described.] What has been said in regard to a year-old son is to be understood as equally applicable to a year-old daughter.

32b [Further, by the Visellian law, those, whether under or over [thirty years of age, who on manumission have become latins, [acquire the ius quiritium], that is to say, become Roman citizens, when they have served six years in Rome in the night watch. It is said that by a senatusconsult of later date citizenship was conceded to them after three years' service.

32c Then, by an edict of Claudius', a latin acquires quiritarian rights by building a vessel large enough to hold 10,000 pecks of grain, and continuing for *six* years to import corn to Rome

33 either in it or in another vessel equally large. Further [by [an enactment of the time of Nero], if a latin worth 200,000

§ 32a. See § 29, note 3.

§ 32b. Comp. Vlp. iii, 5. Lines 7 and 8 of p. 8 are entirely illegible. On authority of Vlp., Hu. thus reconstructs them:—*Praeterea ex lege Visellia tam maiores quam minores XXX annorum manumissi et latini facti ius Quiritium adipiscuntur*; etc.

The Visellian law, referred to in connection with other provisions in tit. C. *ad leg. Visell.* (ix, 21), and tit. C. *quando ciu. actio crim. praetud.* (ix, 31), has been attributed to the year 777 | 24, when Ser. Cornel. Cethegus and L. Visellius Varro were consuls; but Momms. (*Jahrb. d. g. R.* ii, 335) claims for it an earlier date, on the ground

referred to in note 2 to § 22, and on the strength of an inscription.

§ 32c. Comp. Suet. *Claud.* 18; Vlp. iii, 5.

<sup>1</sup> The MS. has *secuntur*.

<sup>2</sup> The *modius* equalled 1·896 imp. gall., or ·948 of an imp. peck.

<sup>3</sup> Those words, illegible in the MS., are supplied on the authority of Vlp.

§ 33. Comp. Vlp. i, 5. A lacuna of about half a line, in which the only letters legible are *ne. s.* On the strength of Tac. *Ann.* xv, 43, Hu. suggests—a *Nerone constitutum est edicto*; P.—*Nerone auctore* (for which word the letter *a* would be a sufficient contraction) *senatus permisit*; and K. u. S.—a *Nerone constitutum est*.

cc milium plurisue habebit, in urbe Roma domum aedificauerit, in quam non minus quam partem dinidiam patrimonii sui  
 34 inpenderit, ius Quiritium consequatur. Denique Traianus constituit ut si (*latinus*) in urbe triennio *pistrinum exercuerit*, (*in quo in*) dies singulos non minus quam centenos (*modios*) frumenti *pinseret*, ad ius Quiritium perueniret.  
 34a — — — — —. [35] — — — — —

sesterces or more spend not less than half that sum in building a house in Rome, he will thereby acquire quiritarian  
 34 rights. Still later Trajan enacted that a latin who had worked a mill in Rome for three years, grinding in it daily not less than a hundred *pecks* of corn, should thereby attain  
 34a to the same distinction. [*A latin may also become a citizen [by direct grant of citizenship from the emperor, or, in the case of*  
 35 [*a woman, by giving birth to three children. Finally, those [who are latins because they have been manumitted informally*

§ 34. Comp. Vlp. iii, 1.

§ 34a. The first three lines of p. 9 are entirely illegible, but probably contained a reference either to acquisition of citizenship *beneficio principali*, as mentioned by Vlp. iii, 2, or to the privilege of the *latina ter eniza* mentioned by him in § 1.

§ 35. Lines 4-14 of p. 9 are to a great extent illegible, but most probably dealt with acquisition of citizenship *iteratione*, referred to in Vlp. iii, 4; Fr. Dos. § 14; Fr. Vat. § 221; Gai. Epit. i, 1, § 4. K. in his *Krit. Versuche*, p. 116, proposed a reconstruction, which in K. u. S. he has amended as follows:—*Minores XXX annorum manumissi, si latini facti sunt quia causa manumissionis apud consilium adprobata non fuerit; item maiores XXX annorum qui uel inter amicos uel ab eo manumissi sunt cuius in bonis non ex iure Quiritium fuerunt, fient ciues Romani si is cuius ex iure Quiritium sunt iuste manumissionem iterauerit. ergo si seruus tuis quidem in bonis, ex iure Quiritium autem meus est, latinus quidem a te solo fieri potest, nec tamen a me iterum manumissus ullo modo ciuis Romanus libertus fit; sed si tu postea ius Quiritium consecutus manumissionem iteraueris ciuis, Romanus fit. Patronatus sane ius tibi in*

*eo conseruatur quocunque modo, etc.*

Hu. proposes:—*Item minores XXX annorum manumissi, si latini facti sunt quod inter amicos causa apud consilium probata est, postea uero maiores XXX annorum facti, item maiores XXX annorum ideo latini facti quod uel inter amicos uel quocunque modo ab eo, cuius tantum in bonis erant, manumissi sunt, iteratione ius Quiritium consequi possunt, id est fiant ciues Romani, si is, cuius ex iure Quiritium sunt, iuste manumissionem iterauerit. ergo si seruus tuis quidem in bonis, ex iure Quiritium autem meus est, latinus quidem a te solo fieri potest, nec pariter tamen iuste postea siue a te siue a me iterum manumissus, ciuis Romanus libertus fit. sed si postea ius Quiritium consecutus in manumisso fuerit is a quo latinus factus est, iterando eum ad ius Quiritium perducere potest, idque ius ei datur quocunque modo, etc.*

Neither of those reconstructions adapts itself very well to the words decipherable in the ms.; and Krueger's reference to the *patronatus* is entirely unsupported. They differ on the two important questions—(1) what latins could by iteration become citizens? and (2) from whom could the iteration proceed?

- 35 datur, quocunque modo ius Quiritium fuerit consecutus. (*cuius*  
*(autem et)* in bonis<sup>1</sup> et ex iure Quiritium sit manumissus, ab  
 eodem scilicet et latinus fieri potest et ius Quiritium consequi.  
 36 (*Non tamen cuiusque uolenti manumittere licet. nam*  
 37 *(is qui)* in fraudem creditorum uel in fraudem patroni<sup>1</sup> manu-  
 mittit nihil agit, quia lex Aelia Sentia inedit libertatem.  
 38 Item eadem lege minori xx annorum domino non aliter manu-  
 mittere permittitur, quam si uindicta apud consilium iusta  
 39 causa manumissionis adprobata fuerit.<sup>1</sup> Iustae autem causae  
 manumissionis sunt ueluti si quis patrem aut matrem aut  
 paedagogum aut conlactaneum manumittat. sed et illae

x [when under the age of thirty, may become citizens by iteration  
 [or renewal of the manumission, and that immediately if it be  
 [renewed in solemn form,—after they have reached thirty if  
 [renewed informally; while those whose latinity is attributable  
 [to the fact that they have been manumitted by an owner who  
 [held them only in bonis, may acquire citizenship on iteration  
 [either by him who was their quiritarian owner at the time,<sup>c</sup>  
 [the first manumission, or by the original manumitter] on his  
 subsequently acquiring quiritary right over them, no matter  
 how. A slave, therefore, who is manumitted by an owner  
 holding him at once on bonitarian and quiritarian title, may  
 from him acquire first the position of a latin and then that of  
 a Roman citizen.

- 36 *It is not every man who pleases that can manumit.* Thus  
 37 the act of one who does so in fraud of his creditors or of his  
 patron is void; the Aelia-Sentian law is here an obstacle to  
 38 liberty. By the same law an owner under twenty years  
 old cannot manumit otherwise than *vindicta*, upon adequate  
 39 cause established before the council. That the slave being  
 manumitted is the manumitter's father or mother, or his  
 teacher, or his foster-brother, is regarded as such an adequate

<sup>1</sup> On the difference between owner-  
 ship *ex iure Quiritium* and *in bonis*,  
 and the effect of manumission by a  
 person having only the latter, see  
 i, 54, ii, 40, note, and Vlp. i, 16;  
 on manumission *inter amicos*, see  
 note to § 41.

§§ 36-41. Comp. tit. I. QVI QVIBVS EX  
 CAVSIS MANVMITTERE NON POSSVNT  
 (i, 6).

§ 36. Lines 19 and 20, p. 9, are vacant  
 in the ms., and Stud. finds no trace  
 of writing. The words in ital. are  
 from pr. tit. I. afd.

x See p. 1, 35 subit. trans.

§ 37. Comp. Vlp. i, 15.

<sup>1</sup> This assumes manumission by a  
 freedman; the enfranchisement of  
 his slave destroyed his patron's  
 reversionary interest in the latter.

§ 38. § 4, tit. I. afd. Comp. §§ 20, 41;  
 Vlp. i, 13; Fr. Dos. § 13; *Lex*  
*Salpensana*, c. 28 (Bruns, p. 123).

<sup>1</sup> So the ms.; Hu. substitutes  
*manumiserit*.

§ 39. § 5, tit. I. afd. Comp. § 19.  
 Several words in this par. are  
 omitted by P. as glosses.



- causae quas superius in seruo minore xxx annorum exposuimus, ad hunc quoque casum de quo loquimur adferri possunt. item ex diuerso hae causae quas in minore xx annorum domino rettulimus, porrigi possunt et ad seruum minorem
- 40 xxx annorum. Cum ergo certus modus manumittendi minoribus xx annorum dominis per legem Aeliam Sentiam constitutus sit, euenit ut qui xiiii annos aetatis expleuerit, licet testamentum facere possit et in eo heredem sibi instituere legataque relinquere, tamen si adhuc minor sit annorum
- 41 xx, libertatem seruo dare non possit. Et quamuis latinum facere uelit minor xx annorum dominus, tamen nihilo minus debet apud consilium causam probare, et ita postea inter amicos manumittere.
- 42 Praeterea lege Fufia Caninia certus modus constitutus est

- cause; to which may be added those causes already enumerated in speaking of the manumission of a slave under thirty; (while, contrariwise, those just specified may be added to those mentioned when speaking of slaves under thirty as
- 40 equally applicable to their case.) A certain limitation being thus imposed by the Aelia-Sentian law upon the power of an owner under twenty to make manumissions, it results that although when he has completed his fourteenth year he may make a testament, and thereby institute an heir and bequeath legacies, yet if he be still under twenty he cannot enfranchise
- 41 one of his slaves. Although an owner under twenty may intend nothing more than to make his slave a latin, he is none the less required to establish the cause of manumission before the council, and then he may manumit informally.
- 42 The Fufia-Caninian law also has imposed a limitation upon

§ 40. § 7, tit. I. afd.

§ 41. Comp. §§ 20, 38; Fr. Dos. §§ 6, 7, 13. There were various informal modes of manumission, of which the principal were—(1) *inter amicos*, by verbal declaration in presence of friends; (2) *per epistulam*, by letter, used when slave from home; and (3) *per mensam*, by an invitation to the slave to sit at table with his owner; see Th. i, 5, § 4. Gai. is in the habit of including all those informal modes of manumission under the specific *man. inter amicos*. Their effect was to make the *manumissus* only a latin, § 17.

§§ 42-46. Comp. tit. I. *DE LEGE FUFIA CANINIA SVBLATA* (i, 7). Before § 42 is a vacant line, intended probably for a rubric.

§ 42. Pr. tit. I. afd. Comp. ii, 228; Paul. iv, 14. The *L. Fufia Caninia* has hitherto been usually known under the name *L. Furia Caninia*, and attributed to the year 761 | 8, apparently for no other reason than that M. Furius Camillus was one of the consuls of that year. It seems to be referred to, along with the Aelia-Sentian law, in Sueton. *Aug.* 40.

- 43 in seruis testamento manumittendis. nam ei qui plures quam duos neque plures quam decem seruos habebit, usque ad partem dimidiam eius numeri manumittere permittitur; ei uero qui plures quam x neque plures<sup>1</sup> quam xxx seruos habebit, usque ad tertiam partem eius numeri manumittere permittitur. at ei qui plures quam xxx neque plures quam centum habebit, usque ad partem quartam potestas manumittendi datur. nouissime ei qui plures quam c habebit nec plures quam d,<sup>2</sup> non plures manumittere permittitur quam quintam partem. *neque plures numerantur*; <sup>3</sup> sed praescribit lex ne cui plures manumittere liceat quam c *contra*, si<sup>4</sup> quis unum seruum omnino aut duos habet, ad hanc legem<sup>5</sup> *non pertinet*, et ideo liberam habet potestatem
- 44 manumittendi. Ac ne ad eos quidem omnino haec lex pertinet qui sine testamento manumittunt. itaque licet iis qui uindicta aut censu aut inter amicos manumittunt, totam familiam liberare, scilicet si alia causa non impediat libertatem.
- 45 *Sed quod* de numero seruorum testamento manumittendorum

- 43 testamentary manumission. It allows the owner of from two to ten slaves to manumit to the extent of one-half of the actual number; him who has more than ten but not over thirty to manumit a third of them; and him who has over thirty but not more than a hundred to manumit a fourth. Lastly, he who has more than a hundred but not more than five hundred is not allowed to manumit more than a fifth of the number. *The enumeration proceeds no further*; but the enactment forbids any one to manumit more than a hundred of his slaves in all. On the other hand, it does not affect him who has only one slave or at most two; his power of manu-
- 44 mitting is unrestricted. Nor does the enactment apply in any way to manumissions otherwise than by testament. Accordingly, by *vindicta*, or by the census, or informally, a man may if he pleases manumit his whole slave establish-
- 45 ment, provided always there be no other impediment. As regards the number that may be manumitted by testament, it

§ 43. Comp. Vlp. i, 24; Paul. iv, 14, § 4.

<sup>1</sup> The words *quam x neque plures* are a marginal amendment.

<sup>2</sup> The words *nec plures quam d* are an interlinear addition, which P. omits.

<sup>3</sup> So Gou.; the MS. has only *atur*, without any space between those letters and the antecedent *plures*;

after *neque plures* Hu. supplies—*quam d habentis ratio habetur, ut ex eo numero pars definiatur.*

<sup>4</sup> The *contra si* is from P.; the MS. has *cqsi*; K. u. S. and Hu. *quod si.*

<sup>5</sup> *Ad hanc legem* is the reading of the MS.; P. suggests *ad hunc lex.*

§ 45. Comp. Vlp. i, 24.

diximus ita intellegemus, *ne umquam ex eo numero ex quo*  
*dimidia aut tertia aut quarta aut quinta pars liberari potest,*  
 — — — —<sup>1</sup> *liceat quam ex antecedenti numero licuit.*  
*et hoc ipsa (ratione)<sup>2</sup> prouisum est: erat enim sane absurdum,*  
*ut x seruorum domino quinque liberare liceret, quia usque*  
*ad dimidiam partem eius numeri manumittere ei conceditur,*  
*alteri autem<sup>3</sup> XII seruos habenti non plures liceret manumittere*  
*quam III; at eis qui plures quam x neque* — — — —  
 45a — — —<sup>4</sup> [45a] — — — — — [46] Nam

is to be understood that a man entitled to enfranchise the  
 the half, or a third, fourth, or fifth part of his whole establish-  
 ment *is in no case to be limited to a smaller number than he*  
 might have liberated had such establishment been reckoned  
 on the immediately preceding [*i.e.* the next lowest] scale.  
 This interpretation of the statute *is dictated by common sense*;  
 for verily it would be absurd that, while the owner of ten  
 slaves might enfranchise five of them, because the statute  
 empowers him to manumit to the extent of a half, another  
 owning twelve should not be allowed to enfranchise more  
 than four; and so he who has more than ten, but not [*more*  
 45a [*than fourteen, may enfranchise five, though this number is*  
 [*greater than a third of his whole establishment.* If any one  
 [*have intended to manumit by testament a greater number than*  
 [*aforesaid, the order in which he has named them is to be scrupu-*

<sup>1</sup> P. fills the lacuna with *pauciores manumitti*; K. u. S. and Hu. *pauciores manumittere*.

<sup>2</sup> So P.; Hu. and K. u. S. have *ipsa lege*. Both are objectionable, so that Gou. suggests *speciali senatus-consulto*. The *ipsa* in the ms., however, is quite distinct, although the next word is illegible.

<sup>3</sup> Hu. reads *ulterius autem*, P. simply *ut*, K. u. S. *domino uero*. The letters in the ms. are interlined, and the reading in the text seems best to correspond to them.

<sup>4</sup> The par. ends on p. 12, which is almost quite illegible. Hu. conjectures—*neque plures quam XXX habent, eadem ratione utique etiam quinque, quot X habenti licuit, manumittere licet*. I prefer something like this—*neque plures quam XIV habent, quinque manumittere permittitur, licet amplior sit numerus quam tertia pars*.

§ 45a. P. 12 of the ms. is illegible. But

in the Epit. i, 2, § 2, immediately preceding the words standing in the text as part of § 46, we read:—*Si aliquis ex testamento plures manumittere uoluerit quam continet numerus supra scriptus, ordo seruandus est: ut illis tantum libertas ualeat qui prius manumissi sunt, usque ad illum numerum quem explanatio continet superius comprehensa: qui uero postea supra constitutum numerum manumissi leguntur, integre in seruitute eos certum est permanere. Quod si non nominatim serui uel ancillae in testamento manumittantur, sed confuse omnes seruos suos uel ancillas is qui testamentum facit liberos facere uoluerit, nulli penitus firma esse iubetur hoc ordine data libertas, sed omnes in serui conditione, qui hoc ordine manumissi sunt, permanebunt.* Comp. ii, 239; Vlp. i, 25.

§ 46. Comp. 21a; 45a, note; Epit. i, 2, § 2; ii, 239.

46 et si testamento scriptis in orbem seruis libertas data sit, quia nullus ordo manumissionis inuenitur, nulli liberi erunt; quia lex Fufia Caninia quae in fraudem eius facta sint rescindit. sunt etiam specialia senatusconsulta quibus rescissa sunt ea quae in fraudem eius legis excogitata sunt.

47 In summa sciendum est, [cum] lege Aelia Sentia cautum sit ut creditorum fraudandorum causa manumissi *liberi* non fiant, etiam hoc ad peregrinos pertinere,—senatus ita censuit ex auctoritate Hadriani: cetera uero iura eius legis ad peregrinos non pertinere.

48 Sequitur de iure personarum alia diuisio. nam quaedam personae *sui iuris* sunt, quaedam alieno iuri subiectae sunt.

49 Sed rursus earum personarum quae alieno iuri subiectae sunt,

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[lously observed; the gift of freedom will avail those only who are first manumitted and within the lawful number, as explained above, while those mentioned afterwards and beyond that number unquestionably remain in slavery. If the slaves be not manumitted each by name, but the testator has attempted to enfranchise them in mass, the freedom thus conferred will be of no avail to any of them; on the contrary, all who have been thus manumitted will still continue in their old condition as

46 [slaves.] And so, if the names of the slaves to be enfranchised be written in the testament in a circle, as there is thus no order or sequence that can be followed, none of them will be free; for the Fufia-Caninian law nullifies anything done in fraud of it. There are besides some special senatusconsults rescinding acts devised to defeat the statute.

47 Finally, it is to be noted that the provision of the Aelia-Sentian law negating the freedom of slaves manumitted in fraud of creditors applies even to peregrins,—so it was declared by the senate at the instance of Hadrian; the other provisions of the statute, however, have not been extended to them.

48 Now comes another division of the law of persons; for some are *sui iuris* [or their own masters], others *alieni iuris* [or

49 domestically dependent]. Further, of those who are *alieni*

§ 47. Comp. § 37.

§§ 48-54. Comp. tit. I. *DE HIS QUI SUI VEL ALIENI IURIS SVNT* (i, 8). In the ms. there is a vacant line before § 48, probably for a rubric.

§§ 48-51. Pr. tit. I. *aff.*, which of course omits mention of *manus* and *mancipium*.

§ 49. Comp. Fr. Vat. §§ 298, 300; *L. Salpensana*, c. 22 (Bruns, p. 121). Persons *in potestate* are dealt with in §§ 52-107, 125-136; those *in manu* in §§ 108-115, 137; and those *in mancipio* in §§ 116-123, 138-141.



- aliae in potestate, aliae in manu, aliae in mancipio sunt.
- 50 Videamus nunc de iis quae alieno iuri subiectae sint: si cognouerimus quae istae personae sint, simul intellegemus quae
- 51 sui iuris sint. Ac prius dispiciamus de iis qui in aliena potestate sunt.
- 52 In potestate itaque sunt serui dominorum,—quae quidem potestas iuris gentium<sup>1</sup> est: nam apud omnes peraeque gentes animaduertere possumus dominis in seruos uitae necisque potestatem esse,<sup>2</sup>—et quodcumque per seruum acquiritur,
- 53 id domino acquiritur.<sup>3</sup> sed hoc tempore neque ciuibus Romanis, nec ullis aliis hominibus qui sub imperio populi Romani sunt, licet supra modum et sine causa in seruos suos saeuire: nam, ex constitutione imperatoris Antonini, qui sine causa seruum suum occiderit non minus teneri iubetur quam qui alienum seruum occiderit. sed et maior quoque asperitas dominorum per eiusdem principis constitutionem coercetur: nam, consultus a quibusdam praesidibus prouinciarum de his seruis qui ad fana deorum uel ad statuas principium confugiunt, praecepit, ut si intolerabilis uideatur

*iuris*, some are *in potestate*, others *in manu*, others *in mancipio*.

- ✓ 50 Let us see first who are *alieni iuris*; from that we can gather
- 51 who are *sui iuris*. And let us begin with those who are in another person's *potestas*.
- 52 Slaves, then, are in the *potestas* of their owners,—and this *potestas* is *iuris gentium*; for we find that amongst all nations alike owners have the power of life and death over their slaves,—and whatever is acquired by a slave is acquired for
- 53 his owner. But at the present day neither Roman citizens nor any other persons subject to the sway of Rome are allowed to inflict excessive or causeless cruelties upon their slaves; for, by a constitution of our emperor Antonine's, any one causelessly killing his slave is as much amenable to justice as if he had killed a slave of a third party. Even great severity on the part of owners is restrained by a constitution of our same sovereign's; for, being consulted by some provincial governors as to what was to be done with slaves seeking an asylum in temples or at imperial statues, he replied that if the harshness of their owners seemed really to be intolerable,

§ 52. § 1, tit. I. afd.

<sup>1</sup> Comp. Vlp. in fr. 4, D. *de I. et I.* (i, 1).

<sup>2</sup> Comp. Senec. *de benef.* iii, 23, §3.

<sup>3</sup> Comp. ii, §§ 86, 88; iii, §§ 163, 166.

§ 53. § 2, tit. I. afd.; Vlp. in *Collat.* iii, 3, §§ 1-3.

x p. 435 'if we know who they are!'

dominorum saeuitia, cogantur seruos suos uendere. et utrumque recte fit:<sup>1</sup> male enim nostro iure uti non debemus; qua ratione et prodigis interdicatur bonorum suorum administratio.<sup>2</sup> Ceterum cum apud ciues Romanos duplex sit dominium,—nam uel in bonis uel ex iure Quiritium uel ex utroque iure cuiusque seruus esse intellegitur,—ita demum seruum in potestate domini esse dicemus si in bonis eius sit, etiamsi simul ex iure Quiritium eiusdem non sit: nam qui nudum ius Quiritium in seruo habet, is potestatem habere non intellegitur.

55 Item in potestate nostra sunt liberi nostri quos iustis nuptiis<sup>1</sup> procreauimus. quod ius proprium ciuium Romanorum est:<sup>2</sup> fere enim nulli alii sunt homines qui talem in filios

these last should be compelled to sell the slaves in question. And in both cases he resolved justly; for one ought not to misuse his right,—a principle we acknowledge in interdicting 54 the administration of his estate to a spendthrift. But as amongst Roman citizens there is a double ownership,—for a slave may belong to a man either on a bonitarian or a quiritarian title, or on both at once,—a slave is in the *potestas* of the owner who has him *in bonis* [or in bonitarian right], although not at the same time holding the quiritarian title; for he who has the bare quiritarian right over a slave is not regarded as having him *in potestate*.

55 Likewise in our *potestas* are those of our children begotten in a marriage approved by the *ius civile*. This right is one peculiar to Roman citizens: there are scarcely any other men

<sup>1</sup> After *fit* the MS. has *regula*; the word has evidently been a marginal note on the original, but stupidly transferred by the transcriber to the text. See the same mistake in iii, §§ 113, 126.

<sup>2</sup> Comp. Vlp. xx, 13; Paul. iii, 4a, § 7.

§ 54. Comp. § 35; ii, 40, and note; ii, 88; iii, 166; Vlp. i, 16; Th. i, 5, § 4. It is from the *διοικήτης βοιτάρης* of the latter that the phrase 'bonitarian ownership' is borrowed, as a convenient rendering of *in bonis*.

§ 55. Comp. tit. I. *DE PATRIA POTESTATE* (i, 9); also Vlp. v, 1.

<sup>1</sup> *Iustae nuptiae* would not be

adequately rendered by 'lawful wedlock.' There were many *iniusta* or *illegitima matrimonia* that were quite lawful, though only as *iuris gentium* alliances, unproductive of the pure civil law consequences of Roman marriage; see § 77, last clause; ii, 241.

<sup>2</sup> That the colonial *latini* had a *patria potestas* of their own, as also a *manus* and *mancipium*, is said to be established by chaps. 21 and 22 of the *lex Salpensana*, referred to in note to § 22. It is evident that the *burgesses* of *Salpensana*, and probably also of *Malaga*, enjoyed those rights; but this may possibly have been due to some special concession to those

suos habent potestatem qualem nos habemus; idque diui Hadriani edicto, quod proposuit de his qui sibi liberisque suis ab eo ciuitatem Romanam petebant, significatur.<sup>3</sup> (nec me praeterit Galatarum gentem credere in potestate parentum liberos esse.)

- 56 [*Iustas autem nuptias ciues Romani contraxisse intelleguntur*] si ciues Romanas uxores duxerint, uel etiam latinas peregrinasue cum quibus conubium habeant: cum enim conubium id efficiat<sup>1</sup> ut liberi patris condicionem sequantur, euenit ut non [*solum*]<sup>2</sup> ciues Romani fiant sed et in potestate patris sint.
- 57 Unde *causa cognita*<sup>1</sup> ueteranis quibusdam concedi solet principalibus constitutionibus conubium cum his latinis

who have over their sons such a power as we have;—a fact noticed by our late emperor Hadrian in an edict of his in reference to persons applying for a grant of citizenship for themselves and their children. (It does not escape me, however, that the Galatians maintain that their children are in *potestate* of their parents.)

- 56 *Roman citizens are held to have contracted a marriage approved by the ius ciuile* if they have taken Roman citizens for their wives, or even latins or peregrins with whom they have *conubium* [or right of intermarriage]. For as it is a consequence of this right of intermarriage that the children follow the condition [or status] of their fathers, it thus comes to pass not only that they become Roman citizens, but that they are in
- 57 their father's *potestas*. Further, after investigation of the circumstances, imperial constitutions have occasionally conceded to veterans the right of intermarriage with such latin

*municipia*, which appear to have been exceptionally favoured. See Houdoy, *Le droit municipal chez les Romains* (Par. 1876), pp. 32 f. See also the passage in the *L. Salpensana*, in Bruns, p. 121.

<sup>3</sup> After *significatur* P. interpolates *sic*, so as to impute the words *nec me praeterit*, etc., to Hadrian; and Hu. gives effect to the same idea by introducing *ait* after *praeterit*. But it is difficult to suppose that the emperor, in granting a favour to a suppliant, would have sought thus to depreciate his gift; besides, *nec me praeterit* is a locution of which Gaius was fond, as see i, 73, iii, 76, iv. 24.

§§ 56-96. Comp. tit. I. *DE NVPTIIS* (i, 10).

§ 56. Lines 5 and 6 of p. 15 are blank, and, according to Stud., have never been written on. The first may probably have been for a rubric, and the second for such words as printed above in ital.; they are from pr. tit. I. *afid.* Comp. Vlp. v, §§ 2, 3, 4, 8.

<sup>1</sup> Comp. § 80.

<sup>2</sup> The sense requires the interpolation of *solum, modo*, or some equivalent.

§ 57. There exist numerous *tabulae honestae missionis* containing such concessions, some of them found in Britain; see examples in Bruns, pp. 177-79.

<sup>1</sup> So P. interprets the *cc* of the ms.; K. u. S., Hu., and other eds., convert them into *et*.

peregrinisue quas primas post missionem uxores duxerint; et qui ex eo matrimonio nascuntur et ciues Romani et in potestate parentum fiunt.

- 58 [Non omnes ciues Romanas nobis uxores ducere licet]: nam a  
 59 quarundam nuptiis abstinere debemus. Inter eas enim personas quae parentum liberorumue locum inter se optinent, nuptiae contrahi non possunt, nec inter eas conubium est, ueluti inter patrem et filiam uel matrem et filium uel auum et neptem; et si tales personae inter se coierint, nefarias et incestas nuptias contraxisse dicuntur. et haec adeo ita sunt, ut quamuis per adoptionem parentum liberorumue loco sibi esse coeperint, non possint inter se matrimonio coniungi, in tantum ut etiam dissoluta adoptione idem iuris maneat. itaque eam quae mihi adoptione filiae seu neptis loco esse coeperit, non potero uxorem ducere, quamuis eam emanci-  
 60 pauerim.<sup>1</sup> Inter eas quoque personas quae ex transuerso

or peregrin women as they should take for their first wives after their discharge; the issue of such marriages are Roman citizens and in the *potestas* of their parents.

- 58 *It is not every woman who is a Roman citizen that we may lawfully take to wife:* from some marriages we are bound to  
 59 abstain. Marriage cannot be contracted, nor is there any *conubium*, between those who stand to each other in the relation of ascendants and descendants, for example, father and daughter, mother and son, grandfather and granddaughter; if such persons have formed a union, they are said to have contracted a nefarious and incestuous marriage. So far is this the case, that, though the relationship of parent and child may have been created only by adoption, they cannot be united in marriage,—no, not even when the bond of adoption has been dissolved. ~~In like manner~~ I cannot take her to wife who by adoption has once become my daughter or granddaughter, even though I may subsequently have emancipated her.  
 60 The same observation applies to the case of persons related

§ 58. Again two vacant lines in the ms. Hu. suggests—*Cum seruilibus uero personis ne nuptiae quidem sunt. Sed nec liberas omnes nobis uxores ducere licet.* But probably the first line was meant for a rubric, and the next one intended to run somewhat as printed above in ital. The words are from § 1, tit. I. afd.; *ciues Romanas* being interpolated to adapt them to the state of matters in the time of Gai.

§ 59. § 1, tit. I. afd. Comp. Vlp. v, 6; Paul. in *Collat.* vi, 3, §§ 1, 2.

<sup>1</sup> Although the artificial relationship was dissolved (§ 158), yet it was repugnant to one's sense of propriety to allow those who had once been related as parent and child to afterwards become husband and wife.

§§ 60, 61. § 2, tit. I. afd. Comp. Vlp. and Paul. as in last note.

× Therefore (p. 436)



gradu cognatione iunguntur, est quaedam similis observatio,  
 61 sed non tanta. sane inter fratrem et sororem prohibita  
 sunt nuptiae, siue eodem patre eademque matre nati fuerint  
 siue alterutro eorum. sed si qua per adoptionem soror mihi  
 esse coeperit, quamdiu quidem constat adoptio, sane inter me  
 et eam nuptiae non possunt consistere; cum uero per eman-  
 cipationem adoptio dissoluta sit, potero eam uxorem ducere;  
*sic* etiam si ego emancipatus fuero nihil impedimento erit  
 62 nuptiis. Fratris filiam uxorem ducere licet: idque primum  
 in usum uenit cum diuus Claudius Agrippinam fratris sui  
 filiam uxorem duxisset;<sup>1</sup> sororis uero filiam uxorem ducere  
 non licet.<sup>2</sup> et haec ita principalibus constitutionibus signifi-  
 63 cantur. Item amitam et materteram uxorem ducere non  
 licet; item eam, quae mihi quondam socrus aut nurus aut  
 priuigna aut nouerca fuit. ideo autem diximus 'quondam,'  
 quia si adhuc constant eae nuptiae, per quas talis adfinitas  
 quaesita est, alia ratione mihi nupta esse non potest; quia

61 collaterally, though not quite to the same extent. As a  
 matter of course marriage is prohibited between brother and  
 sister, whether so related through both parents or only through  
 one. If a woman have become my sister by adoption, then  
 assuredly, so long as the bond exists, we cannot marry; but  
 if the adoption be put an end to by her emancipation I may  
 take her to wife; and the impediment will equally be removed  
 62 by my emancipation. A man may lawfully marry his  
 brother's daughter, the practice having been introduced by  
 the emperor Claudius, who took to wife his brother's daughter  
 Agrippina; but he is not allowed to marry his sister's  
 daughter. The distinction is recognised in various imperial  
 63 constitutions. It is also unlawful to marry a father's or  
 mother's sister. Neither can I marry her who has aforetime  
 been my mother-in-law or step-mother, or daughter-in-law or  
 step-daughter. I say 'aforetime;' for if the marriage which  
 has created the affinity still subsist, I cannot take her to wife

§ 62. Comp. Vlp. v, 6; §§ 3, 5, tit. I. afld.

<sup>1</sup> Comp. Tac. *Ann.* xii, 5-7; Suet. *Claud.* § 26. Domitian, following the example of Claudius, married the daughter of his brother Titus; Suet. *Dom.* 22. Nerva is said to have repealed the Claudian enactment; but the rule it established seems to have revived.

<sup>2</sup> Marriage with the daughter of either a brother or sister was forbidden by Constantius in 339; l. 1, C. Th. *de incest. nupt.* (iii, 12).

§ 63. Comp. Vlp. v, 6; Paul. in *Collat.* vi, 3, § 3; §§ 6, 7, tit. I. afld. Most eds. throw *item amitam* . . . *licet* into § 62, and begin § 63 with *item eam*.

neque eadem duobus nupta esse potest, neque idem duas uxores habere.

- 64 Ergo si quis nefarias atque incestas nuptias contraxerit, neque uxorem habere uidetur neque liberos. itaque hi qui ex eo coitu nascuntur matrem quidem habere uidentur, patrem uero non utique,<sup>1</sup> nec ob id in potestate eius sunt, [*sed tales sunt*]<sup>2</sup> quales sunt hi quos mater uulgo<sup>3</sup> concepit: nam et hi patrem habere non intelleguntur, cum *is etiam* incertus sit; unde solent spurii filii appellari, uel a Graeco uoce quasi *σποράδην* concepti, uel quasi sine patre filii.<sup>4</sup>

- 65 [*Aliquando autem euenit, ut liberi qui statim ut nati*] sunt parentum in potestate non fiant, postea tamen redigantur in  
66 potestatem. (*Nam si latinus*)<sup>1</sup> ex lege Aelia Sentia uxore ducta filium procreauerit, aut latinum ex latina, aut ciuem Ro-

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for this other reason,—that neither can the same woman have two husbands, nor can the same man have two wives.

- 64 He who contracts a nefarious and incestuous marriage is held to have neither wife nor children; therefore the issue of the connection, while indeed they are held to have a mother, yet are not held to have a father, and so are not in his *potestas*. They are in much the same position as those whom a woman has conceived in promiscuous intercourse; for these are not regarded as having any father, his identity being uncertain. Whence it is that they are called spurious children, either (from a Greek word) as being, as it were, conceived here and there, *σποράδην*, or as being children without a father.

- 65 *It sometimes happens that children who are not in the potestas of their parents at birth are yet subjected to it afterwards.* For instance, if a latin who has married in terms of the Aelia-Sentian law have begotten a son,—whether a latin of a latin wife, or a Roman citizen of a Roman wife,—he will not

§ 64. § 12, tit. I. afd. Comp. Vlp. iv, 2; v, 7.

<sup>1</sup> P. transposes thus—*non uero patrem, nec ob id in potestate eius sunt; quales utique sunt hi*, etc.

<sup>2</sup> The words *sed tales sunt* are supplied by K. u. S. after the lead of the Inst.; Hu. reads *sed sunt quales ii*, etc.

<sup>3</sup> *Uulgo* would not be properly translated by 'out of wedlock,' for the children of a concubine were not

*spurii* but *liberi naturales*; comp. § 19, note 1.

<sup>4</sup> Such a child often had the letters S. P. (*sine patre*) appended to his name.

§ 65. Two lines vacant, the first probably for a rubric. The second is supplied from § 13, tit. I. afd.

§ 66. Comp. §§ 29, 80; Vlp. vii, 4.

<sup>1</sup> The words *nam si latinus* are illegible, but obvious from context.

manum ex ciue Romana, non habebit eum in potestate; — — —<sup>2</sup> simul ergo eum in potestate sua habere incipit.

- 67 Item si ciuis Romanus latinam aut peregrinam uxorem duxerit per ignorantiam, cum eam ciuem Romanam esse crederet, et filium procreauerit, hic non est in potestate eius, quia ne quidem ciuis Romanus est, sed aut latinus aut peregrinus, id est eius condicionis cuius et mater fuerit; quia non aliter quisquam ad patris condicionem accedit quam si inter patrem et matrem eius conubium sit. sed ex senatusconsulto<sup>1</sup> permittitur ei causam erroris probare, et ita uxor quoque et filius ad ciuitatem Romanam perueniunt, et ex eo tempore incipit filius in potestate patris esse. idem iuris est si eam per ignorantiam uxorem duxerit quae dediticiorum numero est, nisi quod uxor non fit ciuis Romana.
- 68 Item si ciuis Romana per errorem nupta sit peregrino tamquam ciui Romano, permittitur ei causam erroris probare,

- 
- have that son in his *potestas*; [but if afterwards, on cause shown [under the statute, the father become a Roman citizen,] he
- 67 thereupon at once begins to have him in *potestate*. So, if a Roman citizen have in ignorance taken to wife a latin or a peregrin, believing her to be a Roman citizen, and have begotten a son, the latter is not in his father's *potestas*, because he is not a Roman citizen, but either a latin or a peregrin, that is, of the same condition as his mother; for no one can follow his father's [status or] condition unless there has been *conubium* between his father and mother. But by the senatusconsult he is allowed to prove cause of error, whereby both his wife and son attain to citizenship; and from that moment his son begins to be in his *potestas*. And the same rule holds if through ignorance he has married a woman from amongst those who are accounted dediticians, except that she does not
- 68 become a Roman citizen. So also if a woman who is a Roman citizen has by mistake married a peregrin as if he

<sup>2</sup> About a line almost entirely illegible. Bk. suggests—*sed si postea causa probata ciuitatem Romanam consecutus est pater*, which suits the sense, and, with the usual contractions, suits the space. The suggestions of K. u. S. and Hu. are substantially the same.

§ 67, 68. Comp. §§ 26, 80; ii, 142; iii, §§ 5, 73; Vlp. vii, 41.

<sup>1</sup> There is reason for thinking that this Sct. is the same as referred to in

§§ 30, 80, 81, 92, and Vlp. iii, 3, and in all of them attributed to Hadrian,—a comprehensive enactment regulating the birth-status of children, and *inter alia* introducing *erroris causae probatio* as a means of improving it. The fact that both Hadrian and Antoninus Pius found it necessary to explain it by rescripts (§§ 73, 74) argues for its then recent enactment.

- et ita filius quoque eius et maritus ad ciuitatem Romanam perueniunt, et aequae simul incipit filius in potestate patris esse. idem iuris est si peregrino tamquam latino ex lege Aelia Sentia nupta sit; nam et de hoc specialiter senatusconsulto cauetur. idem iuris est aliquatenus si ei qui dediticiorum numero est tamquam ciui Romano aut latino e lege Aelia Sentia nupta sit, nisi quod scilicet qui dediticiorum numero est in sua condicione permanet, et ideo filius, quamuis fiat ciuis Romanus, in potestatem patris non redigitur.
- 69 Item si latina peregrino, cum eum latinum esse crederet, nupserit, potest ex senatusconsulto *filio nato* causam erroris probare, (*et ita*) omnes fiunt ciues Romani, et filius in potestate
- 70 patris esse incipit. Idem constitutum est si latinus per errorem peregrinam quasi latinam aut ciuem Romanam e lege
- 71 Aelia Sentia uxorem duxerit. Praeterea si ciuis Romanus, qui se credidisset latinum esse, ob id latinam [*duxerit*], permit-

- also were a citizen, she is permitted to prove cause of error, whereby both her son and her husband acquire the status of citizens, the former beginning at the same time to be *in potestate* of the latter. The same is the case if she have married a peregrin under the belief she was marrying a latin in terms of the Aelia-Sentian law; this is a contingency specially provided for in the senatusconsult. And the same is also to some extent the case if she have married a man from the ranks of those reckoned as dediticians, believing him to be either a Roman citizen or a latin privileged by the Aelia-Sentian law; only here the quasi-deditician husband retains his status, and his son, though becoming a Roman
- 69 citizen, does not pass into his *potestas*. So likewise if a latin woman have married a peregrin whom she believed to be a latin, she may, under the senatusconsult, on the birth of a son, prove cause of error, whereby all of them become Roman citizens, and the son passes into the *potestas* of his
- 70 father. Exactly the same is the rule where a latin has by mistake married a peregrin woman, in the manner enjoined by the Aelia-Sentian law, under the impression she was a latin
- 71 or a Roman citizen. Further, if a Roman citizen, believing himself to be a latin, have on that account married a latin

§ 71. The statement in the first part of the par. is unsatisfactory; for it was not cause of error, but cause of marriage that was shown by a latin married in terms of the Aelia-

Sentian law. It is this probably that has led Hu. to make a transposition, and to read—*ob id latinam tamquam e lege Aelia Sentia uxorem duxerit, permittitur*, etc.



- titur ei filio nato erroris causam probare, tamquam [si] e lege Aelia Sentia uxorem duxisset. Item *his* qui, cum ciues Romani essent, peregrinos se esse credidissent et peregrinas uxores duxissent, permittitur ex senatusconsulto filio nato causam erroris probare: quo facto *fiet* peregrina uxor ciuis Romana et filius — —<sup>1</sup> non solum *ad ciuitatem Romanam* 72 peruenit sed etiam in potestatem patris redigitur. Quaecumque de filio esse diximus, eadem et de filia dicta intellegemus. Et quantum ad erroris causam probandam attinet, nihil interest cuius aetatis filius sit *filiaue*, — — — — —<sup>1</sup> si minor anniculo sit filius filiaue, causa probari non potest. nec me praeterit, in aliquo rescripto diui Hadriani ita esse constitutum, tamquam quod ad erroris *quoque causam* 74 *probandam* — — — — —.<sup>2</sup> Si peregrinus ciuem Romanam uxorem *duxerit an et is causam probare (possit)*

- woman, he is allowed on the birth of a son to prove cause of error, just as if he had married in terms of the Aelia-Sentian law. He also who, being really a Roman citizen, but believing himself to be a peregrin, has married a peregrin woman, is allowed by the senatusconsult, on the birth of a son, to prove his cause of error; whereupon the peregrin wife becomes a Roman citizen, and the son *born of the marriage* not only attains to citizenship but passes into the *potestas* of his father. 72 Whatever has here been said of a son applies equally to a 73 daughter. As regards proving cause of error, it is immaterial what be the age of the child, [*the senatusconsult saying [nothing on the subject; unless, indeed, the Aelia-Sentian law be [founded on, and then] proof of the marriage will not be allowed if the son or daughter be less than a year old. I do not overlook that, as if in reference to this matter of proving cause of error, it is laid down in a rescript of Hadrian's that — — — — —.* It is a question whether a peregrin, if he have married a woman that is a Roman citizen, *can prove cause of error* — — — — —.

<sup>1</sup> Gou. fills the lacuna with *qui ex ea natus est*, P. with *quoque statim*, Hu. with *quoque ex ea*.

§ 72. Comp. § 29, note 3; Vlp. iii, 3.

§ 73. Comp. § 29.

<sup>2</sup> Hu. fills the lacuna (two lines) with—*cum senatusconsulto nihil de ea re caueatur: nisi forte latinus uel latina proponatur, quia etiam*

*ex ipsa lege Aelia Sentia latini, si minor, etc.*

<sup>2</sup> The same ed. fills this lacuna (last three lines of p. 19) thus:—*anniculum filium factum necesse sit; sed non semper uideri debet generale ius inductum, cum imperator epistulam ad quendam dedit.*

§ 74. Comp. § 68.

- quaeritur.* — — — — —<sup>1</sup> *hoc ei specialiter concessum est.* sed cum peregrinus ciuem Romanam uxorem duxisset, et filio nato alias<sup>2</sup> ciuitatem Romanam consecutus esset, deinde cum quaereretur an causam probare posset, rescripsit imperator Antoninus proinde posse eum causam probare, 'atque si peregrinus mansisset.' ex quo
- 75 colligimus etiam peregrinum causam probare posse. *Ex his* quae diximus apparet, siue ciuis Romanus peregrinam, siue peregrinus ciuem Romanam uxorem duxerit, eum qui nascitur peregrinum *esse.* sed si quidem per errorem tale matrimonium contractum fuerit, emendari uitium eius [*licet*], secundum ea<sup>1</sup> quae superius diximus; si uero nullus error interuenerit, [*sed*] scientes condicionem suam ita coierint, nullo casu emendatur *uitium eius matrimonii.*
- 76 *Loquimur* autem de his *scilicet* [*inter*] quos *conubium* non sit. Nam alioquin si ciuis Romanus peregrinam cum qua

- But in the case of a peregrin who had taken a Roman citizen to wife, and, after the birth of a son, had himself otherwise become a citizen, when the question was raised whether he could prove cause, our emperor Antonine decided by rescript that he might, 'just as if he had continued to be a peregrin.' From which latter observation we gather that even a peregrin
- 75 may prove cause. From what has been said it is apparent that, whether it be a Roman citizen that has taken a peregrin wife, or a peregrin that has taken a Roman wife, the issue will be a peregrin; but if such a marriage have been entered into through mistake, the flaw in it may be removed in the way that has been described. If, however, there have been no error, but the parties have entered into the relationship in knowledge of each other's condition, then in no case can the defect of the marriage be remedied.
- 76 We have been speaking, of course, of persons between whom *conubium* does not exist. When, on the other hand, a

<sup>1</sup> Between two and three lines (p. 20) illegible. What Gai. seems to have said is, that he was unable to point to any enactment enabling a *peregrinus*, the husband of a citizen wife, himself to acquire citizenship by showing error; but that, judging from an expression of Antoninus Pius' in one of his rescripts, it must be held that such procedure was competent. The only error, however,

that he could plead was error as to his own condition.

<sup>2</sup> Say by gift of citizenship from the emperor; for this did not confer the *potestas* unless expressly coupled with the *ciuitas*, § 93; ii, 135a; iii, 20.

§ 75. Comp. § 68.

<sup>1</sup> For *secundum ea* the ms. has *ex clea*; K. u. S., *ex senatusconsulto licet secundum ea*.

§ 76. Comp. § 56.

- ei conubium est uxorem duxerit, sicut supra quoque diximus, iustum matrimonium contrahit, et tunc ex iis qui nascitur
- 77 ciuis Romanus est et in potestate patris erit. *Item* si ciuis Romana peregrino cum quo ei conubium est nupserit, peregrinus sane procreatur, et is iustus patris filius est<sup>1</sup> tamquam si ex peregrina eum procreasset. (hoc tamen tempore, e senatusconsulto quod auctore diuo Hadriano factum est, etiam si non fuerit conubium inter ciuem Romanam et peregrinum, qui nascitur iustus patris filius est.) Quod autem diximus inter ciuem Romanam peregrinumque — — —

- Roman citizen has married a peregrin woman with whom he has *conubium*, it is, as we have already explained, a lawful Roman marriage that is contracted, and the issue of it will be
- 77 a Roman citizen and in his father's *potestas*. And so, if a woman who is a Roman citizen has given herself in marriage to a peregrin with whom she has *conubium*, the issue will be a peregrin and the lawful child of his father, just as if his mother had been a peregrin. (At the present day, however, in virtue of a senatusconsult which we owe to the late emperor Hadrian, the issue of a marriage between a Roman citizen woman and a peregrin is held to be a lawful child of his father even though there may not have been *conubium*
- 78 between the parents.) Our statement that [*where a marriage has been contracted*] between a Roman citizen and a

§ 77. The latter half of this par. speaks of the legality and validity of a marriage that was not *iustum matrimonium*; see references in notes to §§ 55, 56.

<sup>1</sup> It would appear that prior to the passing of the senatusconsult there was doubt as to the actual position of a child in such a case as here put; its purpose was to declare that if a marriage had actually taken place between his citizen mother and peregrin father, he was to be recognized as his father's lawful son, the absence of *conubium* notwithstanding.

§ 78. Comp. Vlp. v, 8. This par., which is in explanation of the opening statement in § 75, is to a considerable extent illegible; and there is some reason to believe that the transcriber has accidentally omitted a few words. The first lacuna in the text represents four lines of the ms. (5-8 of p. 21), and the second, one

line (the 11th); but in both there are several words perfectly distinct. The reconstructions proposed severally by K. (K. u. S. footnote), M. (K. u. S. p. xviii), and Hu. differ very considerably, and none is altogether satisfactory; but probably the rendering in the translation pretty accurately expresses the meaning of the passage. Vlpian's words are—*lex Minicia ex alterutro peregrino natum deterioris parentis conditionem sequi iubet*.

Prior to Studemund's recension of the Verona ms. the *L. Minicia* here referred to had always been spoken of as *lex Mensia*; it is so called in the Vatican ms. of Vlp. Its date is unknown; but from next par. it must have been of some antiquity, and at all events anterior to the *leges de ciuitate* of the years 664 | 90 and 665 | 89.

— — — — peregrinus ex eo coitu nascatur. sed hoc maxime casu necessaria *lex Minicia* [*fuit*]; *nam remota ea lege*, — — — — conubium, qui nascitur iure gentium matris condicioni accedit. qua parte autem iubet lex ex ciue Romano et peregrina peregrinum nasci, superuacua uidetur; nam et  
 79 remota ea lege *hoc utique* iure gentium futurum erat. Adeo autem hoc ita est ut — — — — —<sup>1</sup> solum exterae nationes *et gentes*, sed etiam qui Latini nominantur; sed ad alios Latinos pertinet,<sup>2</sup> qui proprios populos propriasque ciui-  
 80 tates habebant et erant peregrinorum numero. Eadem ratione

peregrin, the issue will be a peregrin, [*is made on the authority of the Minician law, according to which the child born of an unequal marriage*] follows the condition of the parent [*of lower status. For*] by that enactment [*it was provided that if, without conubium, a Roman citizen took a peregrin to wife, or if a peregrin took to wife a Roman citizen,*] the issue of the marriage should be accounted a peregrin. It was mainly to meet the latter case that the Minician law was necessary; for in the absence of such an enactment [*the child would have followed the condition of its mother; such is the rule of the ius gentium where there is marriage without conubium*]. That part of the enactment, however, which declares that the child of a Roman citizen and a peregrin woman shall be born a peregrin seems superfluous; for this would be the case under the law  
 79 of nations irrespective altogether of the statute. So far does this go, that [*it is simply on the strength of the rule of the ius gentium that the child born of a marriage between a Roman citizen and a woman that is a Junian latin follows the condition of its mother. No doubt the word 'peregrin' in the Minician law has been held to include*] not only strictly foreign nations and peoples, but also those who pass by the name of Latins; but the allusion is to Latins of a different sort, who had their own separate communities and separate states, and were  
 80 really included among the peregrins. Conversely, and

§ 79. Comp. § 80; Vlp. v, §§ 8, 9.

<sup>1</sup> More than two lines totally illegible. The following probably expresses the sense of what is lost:— Adeo autem hoc ita est, ut etiam ex ciue Romano et latina Iuniana qui nascitur, ex solo iuris gentium regula, matris condicioni accedat. Sane 'peregrinorum' appellatione in lege Minicia comprehendere intellegebantur non solum exterae nationes, etc.

<sup>2</sup> The allusion is to the distinction

between the Junian latins, irregularly enfranchised freedmen, dwelling alongside and under the patronage of Roman citizens, and the old Latins of Italy and members of the Latin colonies, who both formed communities apart, and were members of their own ciuitates. See upon this Vangerow, *die Latini Iuniani*, p. 91; Voigt, *Ius. Nat.*, etc., ii, p. 721; Gai. i, 131.

§ 80. Comp. § 30; Vlp. iii, 3.



- ex contrario ex latino et ciue Romana, siue *ex lege Aelia Sentia* siue *aliter contractum* fuerit matrimonium, ciuis Romanus nascitur. fuerunt tamen qui putauerunt ex lege Aelia Sentia contracto matrimonio latinum nasci, quia uidetur eo casu per legem Aeliam Sentiam et Iuniam conubium inter eos dari, et semper conubium efficit<sup>1</sup> ut qui nascitur patris conditioni accedat; aliter uero contracto matrimonio, eum qui nascitur iure gentium matris condicionem sequi, et ob id esse ciuem Romanum. sed hoc iure utimur, ex senatusconsulto<sup>2</sup> quo auctore diuo Hadriano significatur, ut *quoquo modo*<sup>3</sup> ex
- 81 latino et ciue Romana natus, ciuis Romanus nascatur. His conuenienter et illud senatusconsultum, diuo Hadriano auctore, significauit ut ex latino et peregrina, item contra ex peregrino et latina [*qui*] nascitur, is matris condicionem sequatur.
- 82 Illud quoque his consequens est, quod ex ancilla et libero iure gentium seruus nascitur, et contra ex libera et seruo

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- upon the same principle, the child of a [Junian] latin father and Roman citizen mother is a Roman citizen, and that whether the parents have married in accordance with the Aelia-Sentian law or not. Some, indeed, have thought that, if the marriage had been contracted as enjoined by that enactment, the issue would be a latin, the Aelia-Sentian and Junian laws apparently conceding right of intermarriage in such a case to the parents, and the rule being that, where there is *conubium*, the issue follows the condition of the father; but that if the marriage had not been contracted under the statute, the issue, according to the rule of the *ius gentium*, would follow the condition of the mother, and thus be a Roman citizen. But we follow the rule laid down in Hadrian's senatusconsult,—that, in whatever way their marriage may have been contracted, the issue of a latin husband
- 81 and a Roman citizen wife shall be a Roman citizen. In entire conformity with all that has been said above, this also is laid down in the same senatusconsult,—that the child born of a latin father and peregrin mother, or *vice versa*, follows the condition of its mother.
- 82 Further, it follows from the rules we have been explaining that, by the *ius gentium*, the issue of a slave mother and a freeman is born a slave, while conversely the issue of a free

<sup>1</sup> Comp. § 56.<sup>2</sup> See §§ 30, 67, 68, note 1; Vlp. iii, 3.<sup>3</sup> The MS. has merely *qm*; K. u. S. have *omni modo*.  
§ 82. Comp. § 88; Vlp. v, 9.

- 83 liber nascitur. Animaduertere tamen debemus ne iuris gentium regulam uel lex aliqua uel quod legis uicem optinet  
 84 aliquo casu commutauerit. ecce enim ex senatusconsulto Claudiano poterat ciuis Romana, quae alieno seruo uolente domino eius coit, ipsa ex pactione libera permanere sed seruum procreare; nam quod inter eam et dominum istius serui conuenerit eo senatusconsulto ratum esse iubetur. sed postea diuus Hadrianus, iniquitate rei et inelegantia iuris motus, restituit iuris gentium regulam, ut cum ipsa mulier libera  
 85 permaneat, liberum pariat. [Item] ex ancilla et libero poterant liberi nasci; nam ea lege cauetur, ut si quis cum aliena

- 83 woman and a slave is born free. But we must be careful to see whether in any case this rule of the *ius gentium* may not have been altered by statute,—by some *lex* or other  
 84 enactment of equal effect. Take the Claudian senatusconsult: under its provisions a Roman citizen woman cohabiting with another person's slave with the owner's consent, might, in virtue of agreement with the latter, herself retain her freedom, and yet give birth to a slave; for the senatusconsult declared that any such agreement between her and her slave-paramour's owner should be sustained as valid. But afterwards Hadrian, moved by the want of equity in the matter and the incongruity of the rule, re-established the principle of the *ius gentium*,—that if the woman herself remain free it will be to a freeman that she will give birth.  
 85 So also there might be free children born of a slave mother and a free father; for by the same enactment it was provided

§ 83. Comp. Vlp. in fr. 24, D. *de statu hom.* (i, 5).

§ 84. As regards the *S. C. Claudianum* generally, see §§ 91, 160; Tac. *Ann.* xiii, 53; Paul. ii, 21; tit. Th. C. *ad S. C. Claudian.* (iv, 11); tit. C. *de S. C. Claud. toll.* (vii, 24); tit. I. *de success. sublat.* (iii, 12).

§§ 85, 86. Before the opening words of § 85, P. has *Ex contrario per legem* . . . , K. u. S. *Item per legem* . . . , and Hu. *Item e lege latina*; their idea being that the allusions in these two pars. are to some other enactment than the Claudian Set. I see no good reason for this view. There is nothing very unusual in speaking of a Set. as a *lex*; the Claudian law on the tutory of women, for example, was in fact a Set., yet is

always spoken of as *lex Claudia*; see § 157, note. The conventional arrangement referred to in § 85 may quite well have been one of the provisions of the Claudian Set., though not mentioned elsewhere; and the rule in the first part of § 86, which Gai. calls *pars eiusdem legis*, seems to be the same as is alluded to by Paul. ii, 21, § 14, and by him attributed to the Claudian Set. The *apud quos talis lex non est* does not refer to the absence of local statute, but to the non-applicability of the particular provision of the Set. immediately before alluded to,—slavery of the issue when the free mother was aware of the condition of the slave father. Comp. § 89.

- ancilla quam credebat liberam esse coierit, siquidem masculi nascantur, liberi sint, si uero feminae, ad eum pertineant cuius mater ancilla fuerit. sed et in hac specie diuus Vespasianus, inelegantia iuris motus, restituit iuris gentium regulam, ut omni modo, etiamsi masculi nascantur, serui sint eius cuius
- 86 et mater fuerit. Sed illa pars eiusdem legis salua est, ut ex libera et seruo alieno, quem sciebat seruum esse, serui nascantur. itaque apud quos talis lex non est, qui nascitur iure gentium matris condicionem sequitur et ob id liber est.
- 87 Quibus autem casibus matris et non patris condicionem sequitur qui nascitur, isdem casibus in potestate eum patris, etiamsi is ciuis Romanus sit, non esse plus quam manifestum est; et ideo superius rettulimus quibusdam casibus per errorem non iusto contracto matrimonio senatum interuenire et emendare uitium matrimonii, eoque modo plerumque efficere ut in potestatem patris filius redigatur.
- 88 Sed si ancilla ex ciue Romano conceperit, deinde manu-

- 
- that if a freeman had cohabited with another person's slave, believing her to be free, the male issue should be free, while the female issue should belong to the owner of the slave mother. But here, again, Vespasian, struck by the absurdity of the provision, interfered, and re-established the *iuris gentium* rule, that, even if the issue of the connection were males, they should be slaves of him to whom the mother
- 86 belonged. This part of the enactment, however, is still in force,—that the issue of a free woman and another person's slave, of whose condition she was well aware, will be slave. But in the case of parents to whom it does not apply, [*i.e.* when the free mother is ignorant of the condition of the slave father,] the issue, according to the *ius gentium*, follows the condition of the mother and consequently is free.
- 87 It is abundantly manifest that, when a child follows not his father's but his mother's condition, he cannot be in the *potestas* of his father, even though the latter be a Roman citizen; and therefore it is that we have above explained how, in certain cases of marriage that through mistake has not been contracted according to law, the senate has interfered to remedy the defect, and thus almost always brought about the result of putting the child born of it in his father's *potestas*.
- 88 But if a slave woman, who has conceived by a Roman

§ 87. Comp. §§ 67 f.

§ 88. Comp. §§ 55, 89; Vlp. in fr. 46, D. *de adopt.* (i, 7).

missa cuius Romana facta sit, et tunc pariat, licet cuius Romanus sit qui nascitur, sicut pater eius, non tamen in potestate patris est, quia neque ex iusto coitu conceptus est neque ex ullo senatusconsulto talis coitus quasi iustus constituitur. Quod autem placuit, si ancilla ex ciue Romano conceperit, deinde manumissa pepererit, qui nascitur liberum nasci, naturali ratione fit : nam hi qui illegitime concipiuntur statum sumunt ex eo tempore quo nascuntur ; itaque si ex libera nascuntur, liberi fiunt, nec interest ex quo mater eos conceperit cum ancilla fuerit : at hi qui legitime concipiuntur ex conceptionis tempore statum sumunt. itaque si cui mulieri *ciui Romanae praegnati* aqua et igni interdictum fuerit,<sup>1</sup> eoque modo peregrina *facta* tunc pariat, complures distinguunt et putant, siquidem ex iustis nuptiis conceperit ciuem Romanum ex ea nasci, si uero uulgo conceperit peregrinum ex ea nasci. Item si qua mulier cuius Romana praegnas ex senatusconsulto Claudiano ancilla

citizen, on subsequent manumission herself become a Roman citizen, and then give birth to her child, although it will be a citizen as its father is, yet it will not be in his *potestas*, for it was not conceived in lawful intercourse, nor is there any senatusconsult that deals with such intercourse as if it had been lawful. The rule that, if a slave woman conceive by a Roman citizen but do not give birth to her child until after manumission, the child will be free born, rests upon considerations of natural reason. For children illegitimately conceived take their status from the moment of birth, so that if born of a free woman they are free, it being quite immaterial by whom their mother conceived them in her slavery ; but children legitimately conceived date their status from the moment of conception. Therefore if a pregnant woman who is a Roman citizen be interdicted fire and water, and, after thus becoming a peregrin, give birth to a child, many draw a distinction, and hold that if she have conceived in lawful Roman wedlock the child will be a Roman citizen, but that if she have conceived in casual intercourse it will be born a peregrin. So if a pregnant woman who is a Roman citizen become a slave under the Claudian senatusconsult, because she has been

§ 89. Comp. Vlp. v, 10 ; Vlp. in fr. 24, D. *de statu hom.* (i, 5).

§ 90. Comp. § 161 ; Vlp. in fr. 18, D. *de statu hom.* (i, 5).

<sup>1</sup> See § 128, note 2.

§ 91. Comp. §§ 64, 160, and note to § 84 ; Vlp. xi, 11 ; Paul. ii, 24, § 2 ; pr. tit. I. *de ingen.* (i, 4).



- facta sit, ob id quod alieno seruo, inuito et denuntiante domino eius, [*coierit*], *conplures distinguunt* et existimant, si quidem ex iustis nuptiis conceptus sit, ciuem Romanum ex ea nasci, si uero uolgo conceptus sit, *seruum* nasci eius cuius
- 92 mater facta *esset ancilla*. Peregrina quoque si uulgo conceperit, deinde ciuis Romana *facta tunc pariat*, ciuem Romanum parit; si uero ex peregrino secundum leges moresque peregrinorum conceperit, ita uidetur ex senatusconsulto quod auctore diuo Hadriano factum est ciuem Romanum parere, si et patri eius ciuitas Romana donetur.
- 93 Si peregrinus sibi liberisque suis ciuitatem Romanam petierit, *non aliter filii* in potestate eius fient quam si *imperator eos in potestatem* redegerit: quod ita demum is facit si causa cognita aestimauerit hoc filiis expedire. diligentius autem exactiusque causam cognoscit de inpuberibus absentibusque: et haec ita edicto diui Hadriani significantur.
- 94 Item si quis cum uxore praegnate ciuitate Romana donatus

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cohabiting with another person's slave against the will and in spite of the remonstrances of the slave's owner, many again draw a distinction, and think that if she had conceived in lawful Roman wedlock her child will be born a Roman citizen, but that if she had conceived in illicit intercourse it will on birth be the slave of him who has become the mother's owner.

- 92 If a peregrin woman who has conceived in illicit intercourse afterwards become a Roman citizen, and then give birth to her child, it will be of a Roman citizen that she is delivered; if, however, she have conceived by a peregrin according to the laws and customs of peregrins, it appears from Hadrian's senatusconsult that she will give birth to a Roman citizen then only when the father also of the child has had a gift of citizenship.
- 93 If a peregrin have petitioned for a grant of citizenship for himself and his children, these will not be in his *potestas* unless the emperor has expressly subjected them to it. This he does only when, having investigated the whole circumstances, he considers it for their advantage; and, as enjoined in an edict of Hadrian's, the inquiry is to be all the more careful and minute if the children be under puberty or absent
- 94 at the time. Further, if a peregrin have obtained a gift of

§ 92. Comp. §§ 77, 94; also note to § 93. Comp. § 55; ii, 135a; iii, 20; Plin. §§ 67, 68. *Paneg.* 37.

§ 94. Comp. §§ 92, 93.

sit, quamuis is qui nascitur, ut supra dixi, *ciuis* Romanus sit, tamen in potestate patris non fit: idque subscriptione diui Hadriani significatur. qua de causa, qui intellegit uxorem suam esse praegnatam, dum ciuitatem sibi et uxori ab imperatore petit, simul ab eodem petere debet ut  
 95 eum qui natus erit in potestate sua habeat. Alia causa est eorum qui Latii iure cum liberis suis ad ciuitatem Romanam perueniunt; nam horum in potestate fiunt liberi.  
 96 quod ius quibusdam peregrinis ciuitatibus datum est uel a populo Romano uel a senatu uel a Caesare, — — — —

citizenship for himself and his pregnant wife, while, as already said, the child when born will be a Roman citizen, yet he will not be in his father's *potestas*; so it is declared in a rescript of our late emperor Hadrian's. Consequently, in seeking from the emperor a gift of citizenship for himself and his wife, he should, if he knows her to be pregnant, at the same time ask that he may have the child who may be born of her in his  
 95 *potestas*. The case is different with those who by right of latinity attain citizenship along with their children; for their  
 96 children do become subject to their *potestas*. This latinity has been granted to some peregrin states either by the Roman people, the senate, or the emperor, [*and is called the greater*

§§ 95, 96. One of the ways in which a colonial or municipal latin might acquire Roman citizenship was by filling a municipal office for a certain time; it is to this that Pliny alludes in the formula, *per Latium uenire in ciuitatem* (Paneg. 37).

Studemund's revision of the Verona ms. has established the fact, which many had doubted, that of this *Latium* or *ius Latii* there were two varieties, a greater and a lesser. But the distinction is not yet absolutely certain.

Filling up the lacuna as proposed by K. u. S.—*Huius autem iuris duae species sunt: nam, etc.*—the difference in favour of the *maius Latium*, so far as can be gathered from the text, was that, in municipalities which enjoyed it, not only the magistracy but also the decurionate was a stepping-stone to citizenship. If this had really been the distinction, there would have been no occasion for Gai. to allude to it; he is speaking not so much

of acquisition of citizenship as of acquisition of the *patria potestas*; and it seems sufficiently obvious that what he meant to point out was, that sometimes, *but not always*, this was a result of the *ius Latii*.

There is reason to believe that sometimes not only did the magistrate or decurion himself become a Roman citizen on termination of his period of office, but his wife and children became citizens along with him, while in other cases he was the sole beneficiary; this depended on the terms of the municipal charter. The first, in all probability, was technically *maius Latium*,—what seems to have been enjoyed by the municipality of Salpensa (see the *L. Salpensana*, c. 21, Bruns, p. 120); the second technically *minus Latium*.

The lacuna in the text represents about half a line of the ms. P. suggests—*maiusque Latium adpellatur. Nam aut, etc.* The same critic—whose view is that the Verona ms.

aut maius est Latium aut minus: *maius est Latium cum et hi qui decuriones leguntur, et ei qui honorem aliquem aut magistratum gerunt, ciuitatem Romanam consecuntur; minus Latium est cum hi tantum uel qui<sup>1</sup> magistratum uel honorem gerunt ad ciuitatem Romanam perueniunt. idque conpluribus epistulis principum significatur.*

- 97 [*Non solum tamen naturales liberi, secundum ea quae*] diximus, in potestate nostra sunt, uerum et hi quos adoptamus.  
 98 Adoptio autem duobus modis fit, aut populi auctoritate, aut  
 99 imperio magistratus, ueluti praetoris. Populi auctoritate adoptamus eos qui sui iuris sunt: quae species adoptionis

[*latinity. For*] *latinity* is either the greater or the lesser. There is the greater *latinity* when those who are elected to the office of decurions, or who fill some high office or magistracy, acquire Roman citizenship [*along with their parents, [wives, and children];* the lesser, when those who [*are appointed [decurions, or]* hold a magisterial or other high office, themselves alone attain to citizenship. So it is stated in many imperial epistles.

- 97 *It is not only our children by birth, however, that are in our potestas in the manner we have described, but those also whom*  
 98 *we adopt. Adoption is effected in two ways,—either by authority of the people, or by the imperium of a magistrate,*  
 99 *such as the praetor. By authority of the people we adopt those who are sui iuris. This species of adoption is called*

was copied from an older one written in double columns, and consequently in much shorter lines—is of opinion that the copyist has accidentally omitted two of those lines, and that the text should read thus:—*Maius est Latium cum et hi qui decuriones leguntur, et ei qui honorem aliquem aut magistratum gerunt, ciuitatem Romanam [cum parentibus uxoribusque ac liberis] consecuntur; minus Latium est cum hi tantum [ipsi qui decuriones fiunt], uel qui magistratum uel honorem, etc.*

As the text stands there is no appreciable difference between the *maius* and *minus Latium*. Polenaar's amended definition of the former consists with cap. 21 of the *lex municipalis Salpensana* (except that this reads *coniugibusque* instead of *uxoribusque*), and corresponds exactly with the opinion arrived at by Rudorff and Mommsen

before the Verona text had been deciphered by Stud. as above. See Rudorff, *Disp. crit. de maiore ac minore Latio* (Berol. 1860); Mommsen, *die Stadtrechte von Salpensana*, etc., p. 405; Voigt, *Ius. Nat.* ii, 724.

<sup>1</sup> It is in favour of Polenaar's conjecture, just referred to, that we have in the ms. *cum hi tantum uel qui magistratum*, etc., which Hu. and K. u. S. think necessary to amend, the former by transposing the *uel qui*, the latter by deleting the *uel* altogether.

§§ 97-107. Comp. tit. I. DE ADOPTIONIBVS (i, 11).

§ 97. Two lines blank in the ms.; on the first (line 6, p. 26) are faint traces of a rubric. The passage in ital. is supplied from pr. tit. I. afd. Comp. Vlp. viii, 1.

§§ 98, 99. § 1, tit. I. afd. Comp. Cic. *pro domo*, xiii, 34; xxix, 77; Gell. v, 19; Vlp. viii, §§ 2, 3.

dicitur adrogatio, quia et is qui adoptat rogatur, id est interrogatur, an uelit eum quem adoptaturus sit iustum sibi filium esse; et is qui adoptatur rogatur an id fieri patiatur; et populus rogatur an id fieri iubeat. imperio magistratus adoptamus eos qui in potestate parentum sunt, siue primum gradum liberorum optineant, qualis est filius et filia, siue  
 100 inferiorem, qualis est nepos neptis, pronepos proneptis. Et quidem illa adoptio quae per populum fit nusquam nisi Romae fit; at haec etiam in prouinciis apud praesides earum fieri  
 101 solet. Item per populum feminae non adoptantur, nam id magis placuit; apud praetorem uero, uel in prouinciis apud proconsulem legatumue,<sup>1</sup> etiam feminae solent adoptari.  
 102 Item inpuerem apud populum adoptari aliquando prohibitum est, aliquando permissum: nunc ex epistula optimi imperatoris Antonini<sup>1</sup> quam scripsit pontificibus, si iusta causa adoptionis esse uidebitur, cum quibusdam condicionibus permissum est. apud praetorem uero et in prouinciis

adrogation; because both he who is adopting is asked, *rogatur*, whether he will have as his lawful son him he is about to adopt, and he who is being adopted is asked whether he submits, and the people is asked whether it ordains that so it shall be. By the *imperium* of a magistrate we adopt those who are in the *potestas* of parents, whether they be descendants of the first degree, as son or daughter, or of a more remote one, such as grandson or granddaughter, great-  
 100 grandson or great-granddaughter. Note that that sort of adoption which is effected by the vote of the people can proceed only in Rome; but the latter may be effected even in  
 101 the provinces before the provincial governors. Further, women are never adopted by popular vote,—the general opinion was against it; but it is not uncommon for them to be adopted before the praetor, or in the provinces before the  
 102 proconsul or legate. Still further, adoption of a pupil before the people has sometimes been forbidden, sometimes allowed,—at present, according to a letter of our most excellent emperor Antonine, addressed to the pontiffs, if an adequate cause be shown for it, it will be allowed on certain conditions;

§ 100. Comp. Vlp. viii, 4.

§ 101. Comp. Gai. in fr. 21, D. *de adopt.* (i, 7), where he says that women might be adopted by imperial rescript.

<sup>1</sup> The proconsuls were governors

of the popular or senatorial provinces, the legates governors of the imperial ones.

§ 102. Comp. Vlp. viii, 5; § 3, tit. I. *afid.*

<sup>1</sup> Antoninus Pius, in whose reign Gai. was writing this first book.

^ p. 436. 'to take the position of'



apud proconsulem legatumue cuiuscumque aetatis [*personas*]<sup>2</sup>  
 103 adoptare possumus. Illud uero utriusque adoptionis com-  
 mune est, quod et hi qui generare non possunt, quales  
 104 sunt spadones, adoptare possunt. feminae uero nullo  
 modo adoptare possunt, quia ne quidem naturales liberos in  
 105 potestate habent. Item siue quis per populum siue apud  
 praetorem uel apud praesidem prouinciae adoptauerit, potest  
 106 eundem alii in adoptionem dare. Sed et illa quaestio, an  
 minor natu maiorem natu adoptare possit, utriusque adop-  
 107 tionis communis est. Illud proprium est eius adoptionis  
 quae per populum fit, quod is qui liberos in potestate habet,  
 si se adrogandum dederit, non solum ipse potestati adrogatoris  
 subicitur, sed etiam liberi eius in eiusdem fiunt potestate  
 tamquam nepotes.

108 [*Nunc de his personis uideamus quae in manu nostra sunt.*

but we may adopt a person of any age before the praetor, or  
 103 in the provinces before the proconsul or legate. On the  
 other hand, it is common to both species that those who are  
 unable to procreate of their bodies, such as eunuchs, may yet  
 104 adopt; but women cannot in either way, for they have not  
 105 their natural children in their *potestas*. Further, whether  
 the adoption have proceeded before the people, or before the  
 praetor or a provincial governor, the adopter may give his  
 106 adopted child in adoption to a third party. The question,  
 too, whether the younger in years can adopt the elder, is  
 107 common to both sorts of adoption. But this result is  
 peculiar to that which proceeds before the people,—that if a  
 man who himself has children in his *potestas* give himself in  
 adrogation, not only does he himself become subject to the  
*potestas* of the adrogator, but his children do so too in the  
 character of grandchildren.

108 *Let us now turn our attention to persons that are in our*

<sup>2</sup> Added by K. u. S.  
 § 103. § 9, tit. I. afd., where a distinc-  
 tion is made between natural and  
 artificial disability. Comp. Vlp.  
 viii, 6.  
 § 104. Comp. Vlp. viii, 7; § 10, tit. I.  
 afd. *§ a*,  
 § 105. Comp. § 8, tit. I. afd.  
 § 106. The answer was in the negative.

See Cic. *pro domo*, xiii, 34; § 4,  
 tit. I. afd.  
 § 107. § 11, tit. I. afd. Comp. Vlp. viii, 8.  
 § 108. Two vacant lines (1 and 2 of p.  
 28) in the ms.; the first intended  
 probably for a rubric, and the  
 second to contain words such as  
 those in ital., suggested by Goesch.  
 and approved by all editors.

- 109 [*quod*] et ipsum ius proprium ciuium Romanorum est. Sed in potestate quidem et masculi et feminae esse solent; in  
 110 manum autem feminae tantum conueniunt. Olim itaque tribus modis in manum conueniebant, usu, farreo, coemptione.  
 111 Usu in manum conueniebat, quae anno continuo nupta perseuerabat;<sup>1</sup> *nam uelut*<sup>2</sup> annua possessione usucapiebatur,<sup>3</sup> in familiam uiri transibat, filiaeque locum optinebat. itaque lege duodecim tabularum cautum est ut si qua nollet eo modo in manum mariti conuenire, ea quotannis trinotio abesset atque eo modo cuiusque anni [*usum*] interrumperet. sed hoc totum ius partim legibus sublatum est,<sup>4</sup> partim ipsa desuetudine  
 112 oblitteratum est. Farreo in manum conueniunt per quoddam genus sacrificii quod Ioui Farreo fit, in quo farreus panis adhibetur: unde etiam confarreatio dicitur. conplura praeterea huius iuris ordinandi gratia cum certis et sollem-

manus, (*which* also is a right peculiar to Roman citizens).

- 109 Both males and females may be *in potestate*, but it is only  
 110 females that can be *in manu*. Of old they used to pass into this relationship either by use, confarreation, or coemption. A woman passed *in manum* by use who, after marriage, cohabited with her husband for a year continuously; for she was usucapted, as it were, by a year's possession, and so passed into her husband's family, and acquired in it the position of a daughter. Therefore it was provided by the law of the Twelve Tables, that if a wife was unwilling in this way to pass into the *manus* of her husband, she should every year absent herself for three nights, and thus interrupt the currency of each year's *use*. But all the law in reference to this matter is obsolete, being in part repealed by statute, in part obliterated  
 112 by disuse. *Manus* is created *farreo* by a certain kind of sacrifice offered to Jupiter Farreus, in which a spelt cake, *panis farreus*, is employed; hence the word *confarreatio*. Various other formalities are observed in the course of the

§ 110. Comp. Serv. in *Vergil. Georg. i.*, 31 (Bruns, p. 299); Boeth. in *Cic. Top. ii.*, 3, § 14 (Bruns, p. 294).

§ 111. Comp. *Cic. pro Flacco*, xxxiv, 84; Gell. iii, 2, §§ 12, 13; Serv. as in last note.

<sup>1</sup> The ms. has *perseuerabat*; Pol. *perseueranter* [*in domo mariti commorabatur*].

<sup>2</sup> The ms. has *nūū*; Husch. *quia enim uelut*; K. u. S. *quae enim ueluti*.

<sup>3</sup> For the description of usucapion, the cure of a defective right of property by possession for a certain period, see ii, §§ 41-44.

<sup>4</sup> Comp. Tac. *Ann.* iv, 16.

§ 112. Comp. § 136; Vlp. tit. ix; Dion. Hal. ii, 25, 27, 30-32; Plin. *H. N.*, xviii, 3, § 10; Tac. *Ann.* iv, 16, 53; Serv. in *Aen.* iv, 103, 374 (Bruns, p. 297); in *Georg. i.*, 31 (Bruns, p. 299).

- nibus uerbis, praesentibus decem testibus, aguntur et fiunt. quod ius etiam nostris temporibus in usu est: nam flamines maiores, id est Diales Martiales Quirinales, item *reges* sacrorum nisi *ex farreatis nati non leguntur, ac ne ipsi quidem sine*  
 113 *confarreatione sacerdotium* habere possunt. Coemptione uero in manum conueniunt per mancipationem, *id est* per quandam imaginariam uenditionem; nam adhibitis non minus quam v testibus ciuibus Romanis puberibus, item libripende,<sup>1</sup>  
 114 — — — —<sup>2</sup> cuius in manum conuenit. Potest autem

- ceremony, accompanied by certain solemn words of style, and all in the presence of at least ten witnesses. The rite is observed even to this day; for no person is elected to the office of one of the greater flamens, *i.e.* a flamen of Jupiter, Mars, or Quirinus, nor yet to be a *rex sacrorum*, unless born of farreate parents; nor can any such person fill any such priestly office unless he himself have been married by con-  
 113 farreation. By coemption a woman passes into a man's *manus* by means of a mancipation, *i.e.* a sort of imaginary sale; for, in the presence of five Roman citizens of the age of puberty, brought together as witnesses, as also of a balance-holder, [*the man purchases*] with an *as* [*the woman he is receiving*] [in manum, and reciprocally] the woman purchases him whose  
 114 *manus* she is entering. She can perform this coemption,

§ 113. Comp. § 123; Non. Marcell. xii, 50 (Bruns, p. 287); Serv. in *Aen.* iv. 103, 214 (Bruns, p. 297); Boeth. in *Cic. Top.* ii, 3, § 14 (Bruns, p. 294); Isidor. *Orig.* v, 24, § 26 (Bruns, p. 301).

<sup>1</sup> On the function of the *libripens* or balance-holder, see below, § 119.

<sup>2</sup> In what is here marked as a lacuna, the ms. has *a emit eum mulierem*. Gou. accepts it, rendering the initial *a* by *asse*; K. u. S. read simply *emit is mulierem*.

Neither of these readings can well be accepted. They, as well as others that have been proposed, proceed on the assumption that the man was the party fictitiously purchasing the woman. But it is clear that they were both active agents in the matter; for while Gai. speaks of the man as *coemptionator* (§ 118), he refers to the woman as *quae facit coemptionem* (§§ 114, 115). Servius, Boethius, and Isidore, all speak of the *coemptio* as a reciprocal purchase, Non. Marcellus referring only to the purchase by the woman.

There is reason, therefore, to believe—as seems to be the opinion of P., though he does not suggest a reconstruction—that the copyist has omitted some words describing the transaction as a mutual one, and that the original text may have been to this effect—*asse emit uir mulierem quam in manum recipit* (see ii, § 98), *et inuicem emit eum mulier cuius in manum conuenit*. This, so far, is the view now adopted by Hu., who in his last edition reads—*asse emit eum mulier et is mulierem cuius, etc.*

It is not to be lost sight of in regard to the solemnities of coemptions and mancipations generally, that in early latin *emere* did not mean to purchase for a money price, but simply to take, receive, or acquire; see Fest. v. *Redemptores* (Bruns, p. 259), Paul. ex Festo, vv. *Abemito* and *Emere* (Bruns, pp. 236, 241).

- § 114. Comp. § 136; ii, §§ 139, 159. The transcriber has here been so careless that some parts of the par. are introduced no fewer than three times.

- coemptionem facere mulier non solum cum marito suo sed etiam cum extraneo ; scilicet aut matrimonii causa facta coemptio dicitur, aut fiduciae causa : quae enim cum marito suo facit coemptionem, [ut] apud eum filiae loco sit, dicitur matrimonii causa fecisse coemptionem ; quae uero alterius rei causa facit coemptionem aut cum uiro suo aut cum extraneo, ueluti tutelae euitandae causa,<sup>1</sup> dicitur fiduciae causa fecisse coemptionem.
- 115 quod est tale : si qua uelit quos habet tutores deponere<sup>1</sup> et alium nancisci, illis tutoribus [auctoribus]<sup>2</sup> coemptionem facit ; deinde a coemptionatore remancipata ei cui ipsa uelit, et ab eo uindicta manumissa, incipit eum habere *tutorem a quo manumissa est* ; qui tutor fiduciarius dicitur, *sicut [ex] inferi-*
- 115a *oribus*<sup>3</sup> *apparebit*. Olim etiam *testamenti faciendi gratia fiduciaria fiebat coemptio* ; tunc enim non aliter feminae *testamenti faciendi* ius habebant, exceptis quibusdam personis, quam si coemptionem fecissent remancipataeque et manumissae fuissent. sed hanc necessitatem coemptionis faciendae

- however, not only with her husband, but even with a stranger, —in other words, it may be performed either matrimonially or fiduciarily : for she who performs it with her husband that she may stand to him in the position of a daughter, is said to do so for the sake of marriage ; whereas she who performs it, whether with her husband or with a stranger, with some other object in view, as, for instance, getting rid of a tutory, is said
- 115 to have done so for a fiduciary purpose. It is managed thus : if she wants to set aside her existing tutors and obtain another in their stead, she performs coemption with *auctoritas* of the former ; being then remancipated by her coemptionator to a person of her own selection, and afterwards by this last manumitted *vindicta*, she begins to have as her tutor him who has manumitted her, and who, as we shall see hereafter, is
- 115a called her fiduciary tutor. Fiduciary coemption was also had recourse to of old to enable a woman to make a will ; for then women, with a few exceptions, had not the right to execute a testament unless they had performed coemption, afterwards been remancipated, and finally manumitted. But the necessity for this coemption was abolished by the senate

<sup>1</sup> See § 115. As regards fiduciary coemption *testamenti faciendi gratia*, see § 115a, and that *interimendorum sacrorum causa* (not mentioned by Gai.), Cic. *pro Mur.* xii, 27.

§ 115. Comp. §§ 118, 166, 195a ; Fest. v. *Remancipatam* (Bruns, p. 160).

<sup>1</sup> So K. u. S. and Hu. ; the ms. has *reponere*.

<sup>2</sup> K. u. S. change *tutoribus*, which is in the ms., into *auctoribus*.

<sup>3</sup> So the ms. ; K. u. S. substitute *inferius*.

§ 115a. Comp. Liv. xxxix, 9.



ex auctoritate diui Hadriani senatus remisit; <sup>1</sup> — — — — .<sup>2</sup>

115b — — — — —, nihilo minus filiae loco incipit esse :  
nam si omnino qualibet ex causa uxor in manu uiri sit,  
placuit eam filiae iura nancisci.

116 Superest ut exponamus quae personae in mancipio sint.

117 Omnes igitur liberorum personae, siue masculini siue feminini  
sexus, quae in potestate parentis sunt, mancipari ab hoc  
eodem modo possunt quo etiam serui mancipari possunt.

118 Idem iuris est in earum personis quae in manu sunt: nam  
feminae a coemptionatoribus eodem modo possunt — — —  
— — — — — apud coemptionatorem filiae loco sit — —

nupta sit, tamen nihilo minus etiam quae ei nupta non sit, nec

118aob id filiae loco sit, ab eo mancipari possit. [Sed] plerumque<sup>1</sup>

on the authority of our late emperor Hadrian; [and women  
[are now held to have ipso iure as much right in this matter  
115b [as if they had gone through the old form. But, observe,

[that though a woman's coemption with her husband may be  
[intended to be only fiduciary], she nevertheless begins to stand  
to him in the position of a daughter; for, no matter what the  
cause of a wife's being in the *manus* of her husband, it is held  
that she thereby acquires a daughter's rights.

116 We have yet to explain what persons are *in mancipio*.

117 Well, then, all children, whether male or female, that are in  
the *potestas* of a parent may be mancipated by him exactly

118 in the same way as slaves. And so with persons *in manu* ;  
for women may be mancipated by their coemptioners in the  
same way [as are children by their parents; and though she  
[alone] stands to her coemptionator in the position of a  
daughter who is married to him, yet none the less may one  
who is not married to him, and therefore not related to him

118aas a daughter, be mancipated by him. But for the most

<sup>1</sup> Comp. ii, § 112.

<sup>2</sup> Hu. thus conjecturally fills up  
the lacuna:—*censentur enim ipso  
iure feminae capite deminutae.*

§ 115b. Hu. conjecturally fills up the  
lacuna as follows:—*Si tamen mulier  
fiduciae causa cum uiro suo fecerit  
coemptionem*, etc., K. u. S. agree-  
ing as to all but the first three  
words. Comp. §§ 114, 118, 136;  
iii, 14.

§ 116. A vacant line in the ms. before  
this par.

§ 117. Comp. § 132.

§ 118. About a line and a half partially  
illegible; and reason to believe that  
some words have been omitted *per  
incuriam*. Bk., followed almost  
literally by Hu., renders the passage  
thus—*eodem modo possunt manci-  
pari quo liberi a parente mancipan-  
tur; adeo quidem ut quamuis ea sola  
apud coemptionatorem filiae loco  
sit quae ei nupta sit*, etc. Comp.  
§§ 114, 115, 123, 127.

§ 118a. Comp. § 132.

<sup>1</sup> So Hu. and P.; G. and K. u. S.  
prefer *Plerumque uero tunc*.

[*tum*] solum et a parentibus et a coemptionatoribus mancipan-  
tur, cum uelint parentes coemptionatoresque e suo iure eas  
personas dimittere, sicut inferius eidentius apparebit.

- 119 Est autem mancipatio, ut supra quoque diximus, imaginaria  
quaedam uenditio: quod et ipsum ius proprium ciuium  
Romanorum est. eaque res ita agitur: adhibitis non minus  
quam quinque testibus ciuibus Romanis puberibus, et prae-  
terea alio eiusdem condicionis qui libram aeneam teneat, qui  
appellatur libripens, is qui mancipio accipit<sup>1</sup> rem<sup>2</sup> tenens ita  
dicit: HVNC EGO HOMINEM EX IVRE QVIRITIVM MEVM ESSE AIO,  
ISQVE MIHI EMPTVS<sup>3</sup> ESTO HOC AERE AENEAQVE LIBRA; deinde  
aere percutit libram, idque aes dat ei a quo mancipio accipit,<sup>1</sup>  
120 quasi pretii loco. Eo modo et seruiles et liberae personae  
mancipantur; animalia quoque quae mancipi sunt,<sup>1</sup> quo in

part parents and coemptionators proceed to mancipation only  
when they wish to release from their right those who are  
subject to it, as will appear more clearly in the sequel.

- 119 Now, mancipation, as already observed, is a sort of imaginary  
sale; and the right to make use of it is peculiar to Roman  
citizens. It is gone about thus: in the presence of not fewer  
than five Roman citizens of the age of puberty, called together  
as witnesses, and of another person of the same condition  
holding a pair of copper scales, who is called a *libripens*, the  
mancipée or party taking *mancipio*, having hold of the thing  
that is being transferred, says,—‘I say that this slave is mine  
in quiritary right, and be he my purchase with this *as* and  
these copper scales;’ and thereupon he strikes the scales  
with the coin, which he then gives to the mancipient or party  
from whom the slave is being received, as if by way of price.  
120 In this manner both slave and free persons are mancipated;  
as also such animals as are *mancipi*, among which are reckoned

§ 119. Comp. § 113; Vlp. xix, §§ 3, 4; Th. i, 12, § 6; Boeth. in *Cic. Top.* v, 28 (ed. Baier, p. 322); Isidor. *Orig.* v, 25, § 31 (Bruns, p. 302).

<sup>1</sup> As regards the use in the translation of the words mancipée and mancipient, as renderings respectively of *is qui mancipio accipit* and *ei a quo mancipium accipitur*, it is to be observed that it was usual to say of the transferor *seruum mancipat*, and of the transferee *ei mancipatur*; see § 132.

<sup>2</sup> Bk., K. u. S., and Hu. read *aes tenens*, and P. *stipem tenens*. The reading *aes* is that given by Boeth-

ius, but the *rem* in the ms. is quite distinct, and justified by Gai. i, 121, Vlp. xix, 6, and Isidore as above. The same phrase, *rem tenens*, occurs in the formula of *in iure cessio* in Gai. ii, 24, where again it is a question of transfer of a slave.

<sup>3</sup> On the early meaning of the word *emptus*, see § 113, note 2.  
§ 120. Comp. ii, §§ 15, 17, 23, 31; Vlp. xix, 1.

<sup>1</sup> For a *resumé* of the various explanations that have been suggested of the famous distinction between *res mancipi* and *nec mancipi*, see Danz, *Gesch. d. R. R.*, § 119.

- numero habentur boues equi muli asini; item praedia tam urbana quam rustica quae et ipsa mancipi sunt, qualia sunt  
 121 italica,<sup>2</sup> eodem modo solent mancipari. In eo solo praediorum mancipatio a ceterorum mancipatione differt, quod personae seruiles et liberae, item animalia quae mancipi sunt, nisi in praesentia<sup>1</sup> sint mancipari non possunt; adeo quidem ut eum qui mancipio accipit adprehendere id ipsum quod ei mancipio datur necesse sit; (unde etiam mancipatio dicitur quia manu res capitur):<sup>2</sup> praedia uero absentia<sup>3</sup>  
 122 solent mancipari. Ideo autem aes et libra adhibetur quia olim aereis tantum nummis utebantur, et erant asses dupundii semisses et quadrantes,<sup>1</sup> nec ullus aureus uel argenteus nummus in usu erat, sicut ex lege XII tabularum intellegere

- oxen, horses, mules, and asses. Such immoveables likewise, whether houses or lands, as are *mancipi*—and those are so that are of italic right—are mancipated in the same way.  
 121 Mancipation of immoveables differs from other mancipations in this respect only, that slave and free persons, as also animals that are *mancipi*, cannot be mancipated unless they be on the spot, it being necessary that the mancipree should lay hold of the very thing which is being transferred to him as a *mancipium*,—the ceremony gets the name of *mancipatio* because the thing in question is taken with the hand,—whereas immoveables are very often mancipated elsewhere.  
 122 The copper and scales are employed because formerly only copper money was in use, the *as* namely, and the double, half, and quarter *as*, no gold or silver coin being current; this we gather from the law of the Twelve Tables. The efficacy of

<sup>2</sup> *Praedia italica* were provincial lands enjoying the same privileges as lands in Italy (*ius italicum*); in particular, that were capable of being held in property on a perfect Roman title (*ex iure Quiritium*), and of being transferred by the forms of conveyance of the *ius civile*. See Savigny, *Z. f. g. RW.* v, 242, and vi, 356; also *Verm. Schr.* i, 73.

§ 121. Comp. Vlp. xix, 6; Isidor. *Orig.* v, 25, § 31 (Bruns, p. 302).

<sup>1</sup> Comp. § 119; iv, 16.

<sup>2</sup> Comp. ii, 22; Varro *de L. L.* vi, § 85.

<sup>3</sup> Comp. iv, 17.

§ 122. The two first blanks are variously supplied. The sentence containing

them, according to K. u. S., may have run thus—sed in pondere posita; nam et asses librales erant, et dupundii bilibres; unde, etc. Hu. has—sed in pondere; namque uetuli asses librales erant, et dupundii duarum librarum; unde, etc. In the third blank, which represents rather more than half a line of the ms., Bk. reads—item qui dabat olim; but Stud. says this is not justified by what is still legible. Hu. suggests—tunc igitur et qui dabat alicui, etc. Comp. Varro, *de L. L.* v, §§ 169, 170; Plin. *H. N.* xxxiii, 3, § 13.

<sup>1</sup> The words et erant asses . . . quadrantes are dropped by P. as a gloss.

[illegible]

123 [If it be asked wherein consists the difference between a woman [who has performed coemption and persons mancipated by parents [or coemptionators, our answer is that whereas the former retains [her freedom], the latter are really in the position of slaves; so much so that, like these last, they cannot take either an inheritance or a legacy from him who holds them *in mancipio*, unless by the same testament he has given them their freedom. The reason of the difference is manifest: persons mancipated by parents and coemptionators are appropriated by the mancipée with the very same words with which he would appropriate a slave; but the words are different in coemption.

the par. to indicate the difference in effect of the mancipation involved in *coemptio* and the mancipation by a parent or *coemptionator*; the former placed the woman so mancipated in the position of a daughter, while the latter put her in the position of a slave. Comp. ii, §§ 159, 160.



- 124 Videamus nunc quo modo hi qui alieno iuri subiecti sunt  
eo iure liberentur.
- 125 Ac prius de his dispiciamus qui in potestate sunt. Et  
126 quidem serui quemadmodum potestate liberentur, *ex his*  
*intelligere* possumus quae de seruis manumittendis superius  
127 exposuimus. Hi uero qui (*in potestate*) *parentis sunt*, (*mortuo*  
*eo sui iuris fiunt. sed hoc*) distinctionem recipit; nam (*mortuo*  
*patre sane*) omni modo filii filiaeue sui iuris efficiuntur;  
mortuo uero auo (*non omni modo nepotes neptesque sui iuris*  
*fiunt, sed ita si post mortem aui*) in patris sui potestatem  
recasuri non (*sunt. itaque*) si moriente auo (*pater eorum et*  
*uiuat et in potestate*) patris [*sui*] fuerit, tunc post (*obitum aui in*  
*patris*) sui potestate *fiunt*; si uero is, quo tempore auus moritur,  
aut iam (*mortuus est aut*) *exiit de potestate* [*patris, tunc hi, quia*  
*in potestatem*]<sup>1</sup> eius cadere non possunt, sui iuris fiunt.
- 128 Cum autem is cui ob aliquod maleficium ex lege, [*uelut ex*

- 124 Let us see now how those who are subject to another person's  
right may be released from it.
- 125 And let us deal first with those that are *in potestate*. How  
126 slaves are freed from the *potestas* [of owners] may be under-  
stood from what has already been said on the subject of their  
127 manumission. As for those who are in the *potestas* of a  
parent, *they become their own masters, sui iuris, on his death*.  
But there is this distinction,—that while, *by the death of their*  
*father*, sons and daughters invariably become *sui iuris, grand-*  
*children*, on the death of their grandfather, *do not in every case*  
*become so, but only when by that event* they do not fall under the  
*potestas* of their father. Accordingly, if on the death of their  
grandfather *their father be alive, and have been till that moment*  
*in the potestas of his father*, the grandchildren, after the death  
*of the latter*, are in the *potestas* of their father; but if, at the  
time of their grandfather's death, their father either be already  
dead or have passed out of the *potestas* of his father, the  
grandchildren, *because they cannot pass into the potestas of*  
128 *their father*, become *sui iuris*. Then again, as a person  
who, on account of crime and in terms of [*some such enact-*

§§ 124-135. Comp. tit. I. *QUIBUS MODIS*  
*IVS POTESTATIS SOLVITVR* (i, 12).

§ 124. Pr. tit. I. *afd.*

§ 126. Comp. §§ 13-47.

§ 127. Pr. tit. I. *afd.*, from which most  
of the words in italics within paren-

theses, illegible in the text, are bor-  
rowed. Comp. Vlp. x, 2.

<sup>1</sup> Words omitted in the MS. and  
supplied from the Inst.

§ 128. Comp. Vlp. x, 3; § 1, tit. I.  
*afd.*

[*lege*]<sup>1</sup> Cornelia, aqua et igni interdicitur<sup>2</sup> ciuitatem Romanam amittat, sequitur ut quia eo modo ex numero ciuium Romanorum tollitur, proinde ac mortuo eo desinant liberi in potestate eius esse : nec enim ratio patitur ut peregrinae condicionis homo ciuem Romanum in potestate habeat. pari ratione et si ei qui in potestate parentis sit aqua et igni interdictum fuerit, desinit in potestate parentis esse, quia aequae ratio non patitur ut peregrinae condicionis homo in potestate sit ciuis  
 129 Romani parentis. Quodsi ab hostibus captus fuerit parens, quamuis seruus hostium fiat, tamen pendet ius liberorum propter ius postliminii, *quo* hi qui ab hostibus capti sunt, si reuersi fuerint, omnia pristina iura recipiunt ; itaque reuersus habebit liberos in potestate : si uero illic mortuus sit, erunt quidem liberi sui iuris ; sed utrum ex hoc tempore quo mortuus est apud hostes parens, an ex illo quo ab hostibus captus est, dubitari potest. ipse quoque filius neposue si ab

[*ment as*] the Cornelian law, has been interdicted fire and water, forfeits his civic privileges, it follows that, as he is thus removed from the ranks of the citizens of Rome, his children cease to be in his *potestas* exactly as if he were dead ; for it would be contrary to all principle to admit that a man of peregrin condition can have a Roman citizen in his *potestas*. In like manner, if a person who is in the *potestas* of a parent be interdicted fire and water, he ceases to be *in potestate* ; for it is equally against principle that a man of peregrin condition should be in the *potestas* of a parent who is a Roman  
 129 citizen. But if a parent be taken captive by an enemy, although for the time he becomes a slave in the enemy's hands, yet his right over his children is merely suspended, and that on account of the *ius postliminii*, whereby those captured by an enemy resume all their old rights on recrossing the frontier ; on his return he will again have his children in his *potestas*. If, however, he die in captivity, his children will be *sui iuris* ; but whether as from the time of his death in captivity, or as from that of his capture, may be a matter of doubt. In like manner, if a son or grandson be taken captive,

<sup>1</sup> The words *uelut ex lege* interjected by Hu. ; for there were several Cornelian laws, as well as other penal statutes, that imposed the penalty of interdiction of fire and water. The particular one referred to may have been the *L. Cornelia de sicariis*.

popular decree excommunicating and forbidding shelter to an individual who had voluntarily become an exile in order to avoid punishment, Cic. *pro domo*, xxx, 78 ; but in course of time it was a sentence judicially pronounced upon a criminal, depriving him of his status as a citizen.

<sup>2</sup> This was originally done by a § 129. § 5, tit. I. affd. Comp. Vlp. x, 4.

- hostibus captus fuerit, similiter dicemus propter ius post-  
 130 liminii potestatem quoque parentis in suspenso esse. Prae-  
 terea exeunt liberi uirilis sexus de parentis potestate si  
 flamines Diales inaugurentur, et feminini sexus si uirgines  
 131 Vestales capiantur. Olim quoque quo tempore populus  
 Romanus in Latinas regiones colonias deducebat, qui iussu  
 parentis in *coloniam Latinam* nomen dedissent, (*desinebant in*  
*(potestate)*<sup>1</sup> parentis esse, quia efficerentur alterius ciuitatis ciues.  
 132 (*Praeterea*) emancipatione desinunt liberi in potestate  
 parentum esse. sed filius quidem tribus mancipationibus,  
 ceteri uero liberi, siue masculini sexus siue feminini, una  
 mancipatione exeunt de parentum potestate: lex enim XII  
 tabularum tantum in persona filii de tribus mancipationibus  
 loquitur his uerbis: 'si pater filium [*ter*] uenumduit, a patre  
 filius liber esto.' (*eaque*) res ita agitur: mancipat pater

- the *potestas* of his parent will be suspended by reason of the  
 130 same *ius postliminii*. Further, children of the male sex  
 pass out of the *potestas* of a parent on inauguration as flamens  
 of Jupiter, and those of the female sex on their being taken  
 131 as Vestal virgins. Formerly also, in the days when Rome  
 was in the habit of despatching bands of colonists into latin  
 districts, a child who with his parent's authority enrolled his  
 name in such a band, *ceased to be in that parent's potestas*,  
 because he had become a citizen of another state.  
 132 There is yet another way in which children cease to be in  
 the *potestas* of parents, namely, by emancipation. A son indeed  
 does so only after three mancipationes; but as for other  
 children, whether males or females, their exit from the *potestas*  
 is accomplished by one: for the law in the Twelve Tables—  
 'if a father have *thrice* sold his son, then be the son free from  
 his father'—speaks of three mancipationes only in the case of a  
 son. It is managed thus: the father mancipates his son to a

§ 130. Comp. § 145; iii, 114; Vlp. x. 5.

§ 131. Comp. iii, 56; Cic. *pro Caec.* xxxiii, 98; *pro domo*, xxx, 78; Boeth. in *Top.* ii, 4, § 18 (ed. Bait. p. 302).

<sup>1</sup> These words are illegible, but self-evident.

§ 132. A vacant line in the ms. before this par., and the initial word (borrowed from the Inst.) unwritten. Comp. § 135; ii, 141; iv, 79; Epit. i, 6, § 3; Vlp. x, 1; § 6, tit. I. afd.; Th. i, 12, § 6. The last few lines of the par. are thus completed by Hu.

—isque eum postea similiter *uindicta manumittit, quo facto, eum rursus in potestatem patris fuerit reuersus, tertio pater eum mancipat uel eidem uel alii—sed hoc in usu est, ut eidem mancipetur—eaque mancipatione desinit in potestate patris esse, ac si nondum manumissus sit, sed adhuc in causa mancipii apud eum cui mancipatus est. a quo si rursus manumittatur, sui iuris fit.* Restitutions by other eds. are to much the same effect. See the form of mancipation in § 119.

filium alicui; is eum uindicta manumittit; eo facto reuertitur in potestatem patris; is eum iterum mancipat uel eidem uel alii, (sed in usu est eidem mancipari,) isque *eum* postea *similiter* — — — — in potestatem — — — — tertio pater eum mancipat uel eidem uel alii, (sed hoc in usu est ut eidem mancipetur,) — — — — ac si nondum manumissus sit, sed adhuc in causa mancipii. — — — —  
 133 — — — — — . [133a] — — — — — .

third party; the latter manumits him *vindicta*; thereupon he falls again into his father's *potestas*; the father again mancipates him either to the same person as before or to a different one,—it is the usual practice to mancipate to the same,—who again in like manner *manumits him vindicta*, *whereupon he once more returns* into the *potestas* of his father; then a third time his father mancipates him either to the same person or to another,—but our practice is again to mancipate to the same,—and by this last mancipation he ceases to be in the *potestas* of his father, though not yet manumitted, but still in the position of a *mancipium* [in the hands of the individual to whom he has been mancipatèd; but if he be once again  
 133 [manumitted by the latter, he then becomes *sui iuris*. There-  
 fore, when the son has been mancipatèd the third time, his father ought to take care that the *mancipee* remancipates to him, i.e. the father, that so he may become the manumitter, and thus, in the event of his son's death, be entitled, rather than the *mancipee*,  
 133a to his succession. Females and grandsons by a son pass out of the *potestas* of their father or grandfather, and become *sui iuris*, by one mancipation. But though this be the case, yet unless they have been remancipated by the *mancipee* to their father or grandfather, and by him manumitted, he, the father or grandfather, will not be entitled to succeed to them; if, however, he be their manumitter after remancipation, he will be  
 133b [entitled to their succession.] We must keep in mind that it

§§ 133, 133a. Of page 36 of the MS. not more than three or four words are legible. It probably contained at greater length what we find thus stated in the Epit. i, 6, § 3—*Tamen cum tertio mancipatus fuerit filius a patre naturali fiduciario patri, hoc agere debet naturalis pater, ut ei a fiduciario patre remancipetur et a naturali patre manumittatur, ut si filius ille mortuus fuerit, ei in hereditate naturalis pater, non fiduciarius, succedat. Feminae uel nepotes masculi ex filio una emancipatione*

*de patris uel aui exeunt potestate et sui iuris efficiuntur. Et hi ipsi, quamlibet una mancipatione de patris uel aui potestate exeant, nisi a patre fiduciario remancipati fuerint et a naturali patre manumissi, succedere eis naturalis pater non potest, nisi fiduciarius a quo manumissi sunt. Nam si remancipatum eum sibi naturalis pater uel auus manumiserit, ipse eis in hereditate succedit. Comp.*

last sentence of § 6, tit. I. afd.  
 § 133b. None of what is borrowed from the Inst. and printed under this



133b (*Admonendi autem sumus liberum arbitrium esse ei qui filium (et ex eo nepotem in potestate habebit, filium quidem potestate (dimittere, nepotem uero in potestate retinere: uel ex diuerso (filium quidem in potestate retinere, nepotem uero manumittere, (uel omnes sui iuris efficere. eadem et de pronepote dicta esse (intellegemus.)*)

134 — — — — — et duae intercedentes manumissiones proinde fiunt, ac fieri solent cum ita eum pater de potestate dimittit ut sui iuris efficiatur. deinde aut patri remancipatur, et ab eo is qui adoptat uindicat apud praetorem<sup>1</sup> filium suum esse, et illo contra non uindicante a praetore uindicanti filius addicitur; aut non remancipatur patri, *sed* ab eo *uindicat is qui adoptat (apud quem in tertia)*<sup>2</sup> mancipatione est: sed sane commodius est patri remancipari. in ceteris uero liberorum personis, seu masculini seu feminini

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*is in the option of a man who has at the same time a son and a grandson by that son in his potestas, to release the son from it but retain the grandson; or he may retain his son in it, releasing his grandson; or he may make both sui iuris. And the same observation applies to the case of a great-grandson.*

134 [*Then again, parents cease to have in their potestas those of [their children whom they have given in adoption. In the case [of a son who is being given in adoption, three mancipationes] and two intermediate manumissions are carried through, just as when he is being dismissed from his father's potestas in order that he may become sui iuris. Then either he is remancipated to his father, and from him vindicated by the adopter before the praetor, who adjudges him to the adopter in the event of the father asserting no counter-vindication; or else, without any remancipation to his father, he is vindicated by the adopter directly from the party in whose ius he is in virtue of the third mancipation: but it is certainly more convenient that he be remancipated to his father. As regards other descendants than sons, no matter whether male or female, one*

number, is legible in the ms. But, from fr. 28, D. *de adopt.* (i, 7), we know it to have been taken from the first book of Gai., and, judging from the Epit., this seems its proper place. Comp. Epit. i, 6, § 3; § 7, tit. I. afd.

§ 134. The commencement of this par. is on p. 36, and illegible. Goesch. and Husch. supply it as follows:—

*Praeterea parentes etiam liberos in adoptionem datos in potestate habere desinunt. et in filio quidem, si in adoptionem datur, tres mancipationes et duae, etc. As regards the par. generally, comp. § 8, tit. I. afd.*

<sup>1</sup> The *uindicatio* referred to is the procedure by *in iure cessio*, described below, ii, 24.

<sup>2</sup> So rendered by all recent eds.

sexus, una scilicet mancipatio sufficit, et aut remancipantur parenti aut non remancipantur. Eadem et in prouinciis apud  
 135 praesidem prouinciae solent fieri. Qui ex filio semel iterumue mancipato conceptus est, licet post tertiam mancipationem patris sui nascatur, tamen in aui potestate est, et ideo ab eo et emancipari et in adoptionem dari potest. at is qui ex eo filio conceptus est qui in tertia mancipatione est, non nascitur in aui potestate: sed eum Labeo<sup>1</sup> quidem existimat in eiusdem mancipio esse cuius et pater sit: utimur autem hoc iure, ut quamdiu pater eius in mancipio sit, pendeat ius eius; et si quidem pater eius ex mancipatione manumissus erit, cadat in eius potestatem; si uero is dum in mancipio sit decesserit,  
 135a sui iuris fiat. Eadem scilicet — — — — —;  
 nam, ut supra diximus, quod in filio faciunt tres mancipationes,  
 136 hoc facit una mancipatio in nepote. [136] — — — — —

mancipation is sufficient, which may or may not be followed by remancipation to the parent. The same process is gone  
 135 through in the provinces before the governor. A child begotten by a son after his first or second mancipation, even though he be not born till after the third, is nevertheless in the *potestas* of his grandfather, by whom consequently he may be emancipated or given in adoption. But one begotten after the son's third mancipation is not born in his grandfather's *potestas*. According to Labeo, he is *in mancipio* of the person to whom his father has been mancipated: but our rule is that so long as his father continues *in mancipio* the child's status is in suspense; if the former be manumitted from *mancipium*, the latter will fall under his *potestas*, but if he die *in mancipio*  
 135a the child will be *sui iuris*. [*The same rule applies to the case of a great-grandson by a grandson, though the latter has been mancipated only once;*] for, as already said, the same results that follow three mancipations of a son follow one mancipa-  
 136 tion of a grandson. [*The fact that a woman has passed in manum does not as a matter of course release her from her father's potestas, unless she have performed coemption; for by a senatusconsult in reference to the wife of the flamen of Jupiter,*

§ 135. Comp. §§ 89, 132; § 9, tit. I. afd.

<sup>1</sup> See § 196, note 1.

§ 135a. More than a line and a half (p. 38, ll. 2, 3) illegible. The text may have run to this effect—Eadem scilicet *intelligere debemus de propote ex nepote nato, licet nepos*

*semel tantum mancipatus fuerit; nam, etc.*

§ 136. In the outset nearly three lines (p. 38, ll. 6-8) are illegible; in the middle rather more than a line (l. 12). To fill the first blank Hu. suggests — *Mulier eo quod in manum conuenit, nisi coemptionem fecerit, pa-*

*Maximi et Tuberonis cautum est, ut haec quod ad sacra tantum uideatur in manu esse, quod uero ad ceteras causas proinde habeatur atque si in manum non conuenisset.* — — — — — potestate parentis liberantur; nec interest an in uiri sui manu sint an extranei, quamuis hae solae loco filiarum habeantur quae in uiri manu sunt.

137 — — — — — . [137a] (*Sed et remancipatione*)

[*passed at the instance of*] Maximus and Tubero, it was enacted that she should be regarded as *in manu* only as concerned the *sacra*, but that to all other intents she should be held as if she had not passed *in manum* at all. [*Those, however, who pass [in manum by coemption are thereby]* freed from their parent's *potestas*; nor does it matter whether they be in the *manus* of husbands or strangers, (although she only is in the position of a daughter who is *in manu* of her husband).

137 [*Women in manu are liberated therefrom in the same ways [as a daughter is freed from the potestas, namely, by the death [of those in whose manus they are, or by their being interdicted 137a [fire and water.] By remancipation also they cease to be in*

*rentis potestate hodie liberatur; nam de flaminica Diali lege Asinia Antistia ex auctoritate Cornelii Maximi, etc.*

To justify this reading Hu. relies chiefly on Tac. *Ann.* iv, 16. Tac. relates that Tiberius, having experienced difficulty in filling up the office of *flamen Dialis*, through a paucity of persons qualified by far-reare birth (see Gai. i, 112), induced the senate, in the year 776 | 23, to pass a law to the intent set forth above. To this enactment, which, judging from the language of Tac., must have been a *senatusconsulto*, Hu., at his own hand, gives the name of *L. Asinia Antistia*, from the two consuls of the year; adding (to make his conjecture correspond with the mention of Maximus and Tubero in the ms.) that it had originally been recommended by Cornelius Maximus and (Q. Aelius) Tubero, two celebrated jurists of the end of the republic, but hardly contemporaries.

But Augustus had previously dealt with the matter; so Tac. himself mentions in the passage above referred to. The occasion was the re-establishment of the office of *flamen Dialis*, long in abeyance. This was

in the year 743 | 11; see Dio Cass. liv, 27, Suet. *Aug.* 31. The consuls of that year were Q. Ael. Tubero and Paulus Fabius Maximus. We are therefore fairly entitled to assume that as Augustus did in fact do something to (as Tac. puts it) adapt the old *confarreatio* to modern ideas,—that as he certainly was dealing with the position of the *flamen Dialis* in the year 743, and that as the consuls of that year were a Maximus and a Tubero,—the reference in Gai. is to them; see Karlowa, *die Roem. Ehe*, (Bonn, 1868), p. 42. Hence I prefer something like this—*nam senatusconsulto de flaminica Diali* (Gai. i, 112, last clause) *facto, ex auctoritate* Maximi, etc.

The second lacuna Hu. supplies with the words—*cae uero mulieres, quae in manum conueniunt per coemptionem, potestate, etc.* This probably represents accurately the meaning of the words that are wanting.

§§ 137, 137a. Here apparently was introduced an account of the ways of ending the *manus*. The first three and a quarter lines (p. 12, ll. 16-19) of the passage are illegible, and so are three and a half (with exception

137 *adesinunt in manu esse; et si ex ea mancipatione manumissae fuerint, sui iuris efficiuntur.* — — — — —

nihilo magis potest cogere, quam et filia patrem. sed filia quidem nullo modo patrem potest cogere, etiam si adoptiva sit: haec autem [*uirum*] repudio misso proinde compellere potest atque si ei nunquam nupta fuisset.

138 *Ii qui in causa mancipii sunt, quia servorum loco habentur,*

139 *vindicta, censu, testamento manumissi sui iuris fiunt. Nec tamen in hoc casu lex Aelia Sentia locum habet: itaque nihil requirimus cuius aetatis sit is qui manumittit et qui manumittitur; ac ne illud quidem an patronum creditoremue manumissor habeat. ac ne numerus quidem legis Fufiae*

140 *Caninae finitus in his personis locum habet. Quin etiam*

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*manu; and on manumission after remancipation become sui iuris. [But between the woman who has performed coemption [with a stranger and her who has performed it with her husband there is this difference,—that the former may compel her coemptionator to remancipate her to any one she pleases, [whereas the latter] can no more compel her husband to do so than can a daughter compel her father to emancipate her. A daughter can never do this, even though she be only an adoptive one; but a wife, who has had a writing of divorce sent to her, may compel her husband to free her from the manus, as if she had never been married to him.*

138 *Those in the position of mancipia, being regarded as if they were slaves, become sui iuris on their manumission either*  
 139 *windicta, or through the medium of the census, or by testa-*  
 139 *ment. But in their case the Aelia-Sentian law does not*

*apply; therefore it is unnecessary to inquire as to the age either of the manumitter or the manumitted, or whether the manumitter has a patron or creditors; and such persons are not affected by the limitations of the Fufia-Caninian law as to the number [of persons an individual may manumit].*

140 *Moreover, they may obtain their freedom by means of the*

of the words *cogere coemptionatorem*) in the middle of it (ll. 21-24). To supply the first blank, Hu. suggests — *Feminae quae in manu sunt similiter eo iure liberantur atque filiae quae in potestate sunt, velut morte eius cuius in manu sunt, siue ei aqua et igni interdictum fuerit. Sed et remancipatione, etc.* To supply the second, K. u. S. suggest — *Inter eam uero quae cum extraneo, et eam quae cum uiro suo coemptionem*

*fecerit, hoc interest, quod illa quidem cogere coemptionatorem potest ut se remancipat cui ipsa uelit, haec autem uirum suum nihilo magis, etc.* Both those restitutions probably fairly represent the import of the illegible lines. Comp. § 118.

§ 138. Comp. §§ 17 (notes), 123; ii, 160; iii, 114.

§ 139. Comp. §§ 18, 37, 38, 42-47.

§ 140. Comp. iv, §§ 75, 79; Papin. in Collat. ii, 3; § 7, l. de nox. act. (iv, 8).



inuito quoque eo cuius in mancipio sunt censu libertatem consequi possunt, excepto eo quem pater ea lege mancipio dedit ut sibi remancipetur; nam quodammodo tunc pater potestatem propriam reservare sibi videtur eo ipso quod mancipio recipit. ac ne is quidem dicitur inuito eo cuius in mancipio est censu libertatem consequi, quem pater ex noxali causa [mancipio dedit],<sup>1</sup> ueluti quod furti eius nomine damnatus est, [et eum]<sup>1</sup> mancipio actori<sup>2</sup> dedit: nam hunc actor  
 141 pro pecunia habet. In summa admonendi sumus aduersus eos quos in mancipio habemus nihil nobis contumeliose facere licere; alioquin iniuriarum<sup>1</sup> tenebimur. ac ne diu quidem in eo iure detinentur homines; sed plerumque hoc fit dicis gratia modo<sup>2</sup> uno momento, nisi scilicet ex noxali causa manciparentur.<sup>3</sup>

142 Transeamus nunc ad aliam diuisionem. nam ex his

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census even against the will of him who has them *in mancipio*, except when he holds under condition of remancipation to the father from whom he has received them; in such case the father is held to have in a manner reserved his power over his child by his bargain that he is to have him back again as a *mancipium*. Nor can he who has been given by his father as a noxal *mancipium*,—as when his father, having on his account been condemned in an *actio furti*, has surrendered him to the pursuer,—obtain his freedom by means of the census against the will of the party to whom he has been surrendered; for the latter holds him instead of pecuniary compensation.

141 And be it observed, finally, that we must not treat with indignity those we hold *in mancipio*, otherwise we shall be liable to them in an *actio iniuriarum*. It is not for any long time that persons are detained in this condition, but usually as a mere matter of form and only for a moment, unless they have been mancipated noxally.

142 Let us pass now to another division [of the law of persons]:

<sup>1</sup> Rejected by M. (K. u. S. footnote) as glosses.

<sup>2</sup> The noxal surrender was not necessarily to the owner of the stolen property, but to the party entitled to the *actio furti*; see iv, 203.

§ 141. Comp. § 118a, and references in note to last par.

<sup>1</sup> Comp. iii, §§ 220 f.

<sup>2</sup> So Hu.; the ms. has *m*.

<sup>3</sup> So the ms.; P. reads by way of emendation—*mancipati sint a parente*.

§§ 142-154. Comp. tit. I. DE TUTELIS (i, 13).

§§ 142, 143. Pr. tit. I. affd.

- personis quae neque in potestate neque in manu neque in mancipio sunt, quaedam uel in tutela sunt uel in curatione, quaedam neutro iure tenentur. uideamus igitur quae in tutela, quae in curatione sint: ita enim intellegemus
- 143 ceteras personas quae neutro iure tenentur. Ac prius dispiciamus de his quae in tutela sunt.
- 144 Permissum est itaque parentibus liberis quos in potestate sua habent testamento tutores dare: masculini quidem sexus inpueribus, [*feminini etiam puberibus, et tum quo*]que<sup>1</sup> cum nuptae sint. ueteres<sup>2</sup> enim uoluerunt feminas, etiamsi perfectae aetatis sint, propter animi leuitatem<sup>3</sup> in tutela esse.
- 145 Itaque si quis filio filiaeque testamento tutorem dederit, et ambo ad pubertatem peruenerint, filius quidem desinit habere tutorem, filia uero nihilo minus in tutela permanet: tantum enim ex lege Iulia et Papia Poppaea<sup>1</sup> iure liberorum tutela

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for of those who are neither in *potestas*, *manus*, nor *mancipium*, some are under tutory or curatory, and others under neither of those guardianships. Let us see, therefore, who are under tutory, and who under curatory; for thus we shall understand

143 who they are that are in neither. And let us begin with those who are in tutelage.

- 144 It is permitted, then, to parents to appoint tutors by testament to those of their children who are in *potestate*,—to males if under puberty, [*to females even if above it, and even*] though they be married. For the old jurists thought it right that women, although of full age, should continue under tutory
- 145 because of their fickleness of judgment. Therefore, if a man have by testament appointed a tutor to his son and daughter, and these both arrive at the age of puberty, the former thereupon ceases to have a tutor, but the latter still continues to be in tutelage; for it is only in respect of the privilege they enjoy under the Julian and Papia-Poppaeian

§ 144. Comp. Vlp. xi, §§ 1, 14, 15; § 3, tit. I. afd.

<sup>1</sup> The words in ital. are not in the ms.; they are supplied as manifestly omitted *per incuriam*, and necessary to complete the sense. K. u. S. interpolate—*feminini autem sexus cuiuscumque aetatis sint, et tum quoque*, etc.; Hu.—*feminini uero inpueribus puberibusque*, etc.

<sup>2</sup> A technical word with the classical jurists, designative of their predecessors of the republican period.

<sup>3</sup> Comp. § 190 and notes; Vlp. xi, 1.

§ 145. Comp. § 194; iii, 44; Vlp. xi, 28a.

<sup>1</sup> A 'matrimonial code,' carried by Augustus in the year 762 | 9, as a revision and amendment of the *L. Iulia de maritandis ordinibus* (passed 757 | 4, after having been twenty-one years before the legislative bodies): see Tac. *Ann.* iii, §§ 25, 28; Dio Cass. lvi, 10. It was regarded as one of the most important

- liberantur feminae. loquimur autem exceptis uirginibus Vestalibus, quas etiam ueteres in honorem sacerdotii liberas esse uoluerunt:<sup>2</sup> itaque etiam lege XII tabularum cautum est.
- 146 Nepotibus autem neptibusque ita demum possumus testamento tutores dare, si post mortem nostram in patris sui potestatem iure recasuri non sint. itaque si filius meus mortis meae tempore in potestate mea sit, nepotes quos ex eo [*habeo*] non poterunt ex testamento meo habere tutorem, quamuis in potestate mea fuerint; scilicet quia mortuo me in patris sui
- 147 potestate futuri sunt. Cum tamen in conpluribus aliis causis postumi pro iam natis habeantur, et in hac causa placuit non minus postumis quam iam natis testamento tutores dari posse, si modo in ea causa sint ut, si uiuis nobis nascan-

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law as mothers of children, that women are freed from tutory. We must except, however, the Vestal virgins, whom even the ancients, out of respect for their priestly office, held to be free: so in fact it was provided by the law of the Twelve Tables.

- 146 To our grandsons and granddaughters we can appoint tutors by will then only when they are not on our death to pass by operation of law into the *potestas* of their father. Accordingly, if my son be in my *potestas* at the time of my death, my grandchildren by him cannot have a tutor under my testament, notwithstanding that they may be in my *potestas*; for
- 147 on my death they will be in that of their father. As in other cases posthumous children are regarded as already born, so in this; for it is held that we may by testament appoint tutors to our children to be born as well as to those already in life, provided, as regards the former, that if they be born

pieces of Roman statute law, and formed the subject of innumerable commentaries.

The purpose of the *lex de maritand. ordinib.* seems to have been to prevent misalliances, encourage equal marriages, and regulate divorce; the Papia-Poppaeian additions went farther, endeavouring not only to multiply marriages, but to insure their fruitfulness. This was attempted by a system of rewards and penalties. Amongst the rewards were—for men, a gradation of honours according to the number of their lawful children alive or killed in battle, and admission to office in the state in the case of a parent at an earlier age than in the case of an

individual who was childless; for women, relief from tutory, and right, more or less restricted, of independent testamentary disposition, if they were the mothers of a certain number of children. Of the penalties of celibacy and unfruitful marriage, the chief was incapacity in many cases to take a testamentary succession or bequest. Many testamentary gifts thus lapsed or became technically *caduca*. For their disposal the statute contained elaborate provisions: hence the name of *Lex Caducaria* so often applied to it.

<sup>2</sup> See Plut. *Numa*, 10; Schoell, *Tab.* v, 1.

§ 146. § 3, tit. I. *afd.* Comp. § 127.

§ 147. § 4, tit. I. *afd.*

- tur, in potestate nostra fiant : hos [*enim*]<sup>1</sup> etiam heredes instituere possumus,<sup>2</sup> cum extraneos postumos heredes instituere  
 148 permissum non sit.<sup>3</sup> [*Vxori*] quae in manu est, proinde ac filiae, item nurui quae in filii manu est, proinde ac nepti, tutor dari potest.
- 149 Rectissime autem tutor sic dari potest : LVCIVM TITIVM LIBERIS MEIS TVTOREM DO ; LVCIVM [*TITIVM VXORI MEAE*] TVTOREM DO. sed et si ita scriptum sit : LIBERIS MEIS uel  
 150 VXORI MEAE TITIVS TVTOR ESTO, recte datus intellegitur. In persona tamen uxoris quae in manu est recepta est etiam tutoris optio, id est ut liceat ei permittere quem uelit ipsa tutorem sibi optare, hoc modo : TITIAE VXORI MEAE TVTORIS

- in our lifetime they will be in our *potestas*. For we may institute such posthumous children as our heirs ; although we cannot so institute the after-born children of a stranger.
- 148 A tutor may be appointed to a wife *in manu* as if she were a daughter, and to a daughter-in-law in the *manus* of a son as if she were a granddaughter.
- 149 The most regular way of appointing a testamentary tutor is by words such as these : 'I appoint Lucius Titius as tutor to my children ;' 'I appoint Lucius [*Titius*] as tutor [*to my wife*].' But if it be in these terms : 'Be Titius tutor to my children,' or 'to my wife,' the appointment will equally be  
 150 sustained as regular. In the case of a wife *in manu*, however, an option may be conferred upon her ; that is to say, a husband may permit his wife to choose whom she will as her tutor, in this way : 'To my wife Titia I give the choice of

<sup>1</sup> Added by Hu. and adopted by K. u. S.

<sup>2</sup> Comp. ii, 130.

<sup>3</sup> Comp. ii, 242.

§ 148. Comp. ii, 159 ; Boeth. in *Cic. Top.* ii, 4, § 18 (ed. Baiter, p. 302).

§ 149. Comp. ii, 289 ; Paul. in *Fr. Vat.*, § 229. In the ms. we have *titium liberis meis tutorem do lego* aut 'do.' Gou., pointing out that we have no example of *lego* being employed in the testamentary appointment of a tutor, renders the *lic. tutdo* of the ms. by *Lucium tutorem do*, as a second and simpler style. This is adopted by P. in his text ; but in a footnote he suggests that the second style pos-

sibly applied to the appointment of a tutor to a wife, and that the copyist may have omitted the appropriate words. This view, I think, may be accepted for two reasons—(1) that though we often have *Titius* standing alone, we nowhere in the text find *Lucius* ; (2) that the second branch of the par. seems to refer to an antecedent form of appointing a tutor to a wife, in which the word *do* has been used. Hu., in his last edition, adopts a similar reading ; but K. u. S. drop the *lic. tutdo* altogether.

§§ 150-153. Comp. *Liv.* xxxix, 19 ; *L. Salpensana*, c. 22 (Bruns, p. 121). The words *tutorem optare* in § 150 are not in the ms., but manifestly have been omitted *per incuriam*.



- OPTIONEM DO; quo casu licet uxori [*tutorem optare*] uel in  
 151 omnes res uel in unam forte aut duas. Ceterum aut plena  
 152 optio datur aut angusta. Plena ita dari solet ut proxime  
 supra diximus. angusta ita dari solet: TITIAE VXORI MEAE  
 TVTORIS OPTIONEM DVMTAXAT<sup>1</sup> SEMEL DO, aut DVMTAXAT BIS DO.  
 153 Quae optiones plurimum inter se differunt. nam quae plenam  
 optionem habet, potest semel et bis et ter et saepius tutorem  
 optare: quae uero angustam habet optionem, si dumtaxat  
 semel data est optio, amplius quam semel optare non potest;  
 si tantum bis, amplius quam bis optandi facultatem non  
 154 habebit. Vocantur autem hi qui nominatim testamento  
 tutores dantur, datiui, qui ex optione sumuntur, optiui.  
 155 Quibus testamento quidem tutor datus non sit, iis ex lege  
 XII [*tabularum*] agnati sunt tutores, qui uocantur legitimi.  
 156 Sunt autem agnati per uirilis sexus personas cognatione iuncti,  
 quasi a patre cognati, ueluti frater eodem patre natus, fratris  
 filius neposue ex eo, item patruus et patroi filius et nepos ex

- her tutor.' When this is done she is free to choose either a  
 tutor who is to act with her in all her affairs, or one who is to  
 151 act for her in one or two matters only. Her option may be  
 152 either limited or unlimited. It is unlimited when con-  
 ferred in such terms as above; limited when conceived in this  
 way: 'I give my wife Titia the choice of her tutor, but only  
 153 once,' or 'only twice.' There is a great difference between  
 these two options; for she who has unlimited option may  
 choose a tutor once, twice, thrice, or oftener if she likes;  
 whereas she whose option is limited by 'once' cannot choose  
 oftener than once, while if limited by 'twice' she has no  
 154 right to choose oftener than twice. Tutors appointed in a  
 testament by express nomination are called tutors dative;  
 those selected in virtue of a power of option, tutors optive.  
 155 Those to whom no tutor has been appointed by testament,  
 by the law of the Twelve Tables have their agnates as tutors,  
 156 —hence called tutors-at-law. And by agnates are to be  
 understood persons who are of kin through males,—cognate,  
 as it were, through the father; as, for instance, a brother by  
 the same father, such a brother's son or a grandson through  
 the latter, a father's brother, a father's brother's son, or a  
 father's brother's grandson through the last. Those who are

§ 152. <sup>1</sup> In MS. *dumtaxat tut. optionem*.

§ 154. Comp. Vlp. xi, 14.

§§ 155–158. Comp. tit. I. *DE LEGITIMA*  
*AGNATORVM TVTELA* (i, 15).

§ 155. Pr. tit. I. afd. Comp. Schoell,  
*Tab. v*, 6; Vlp. xi, 3.

§ 156. § 1, tit. I. afd. Comp. iii, 10;  
 Vlp. xi, 4.

eo. at hi qui per feminini sexus personas cognatione coniunguntur non sunt agnati, sed alias naturali iure cognati. itaque inter auunculum et sororis filium non agnatio est, sed cognatio. item amitae, materterae filius non est mihi agnatus, sed cognatus, et inuicem scilicet sic ego illi eodem iure coniungor; quia qui nascuntur, patris, non matris familiam  
 157 secuntur. Sed olim quidem, quantum ad legem XII tabularum attinet, etiam feminae agnatos habebant tutores. sed postea lex Claudia<sup>1</sup> lata est, quae, quod ad feminas attinet, [agnatorum] tutelae sustulit: itaque masculus quidem inpubes fratrem puberem aut patrum habet tutorem; femina uero<sup>2</sup>  
 158 talem habere tutorem non potest [cogi].<sup>3</sup> Sed agnationis quidem ius capitis deminutione perimitur, cognationis uero ius eo modo non commutatur; quia ciuilis ratio ciuilia quidem iura corrumpere potest, naturalia uero non potest.

of kin through females are not agnates, but merely by natural law cognates. Therefore there is no agnation between a mother's brother and her son,—only cognation. The son of my father's or mother's sister is not my agnate, but my cognate, and I of course stand to him in the same relationship; for children follow the family of their father, not that of their  
 157 mother. Of old, and under the law of the Twelve Tables, women also had their agnates for their tutors. But afterwards, by the Claudian law, this tutory was abolished in so far as women were concerned; so that now, while a male under the age of puberty has as his tutor his own or his father's brother, a woman cannot be compelled to have such a person as her  
 158 tutor. The right of agnation is put an end to by *capitis deminutio*. This, however, makes no alteration in the right of cognation; for, though purely civil considerations may destroy civil rights, they cannot have that effect on natural ones.

§ 157. Comp. § 171; Vlp. xi, 8; l. 3, C. de leg. tut. (v, 30).

<sup>1</sup> We have no precise information as to the enactment of the Claudian law here referred to; though called a *lex* it was probably a senatusconsult passed on the proposal of Claudius, as Lange (*Roem. Alt.*) thinks, in the year 800 | 47; comp. note to §§ 173, 174.

<sup>2</sup> That is to say, women above puberty; for it does not appear that

female any more than male pupils were ever exempted from the tutory-at-law of their agnates.

<sup>3</sup> So Gou. The ms. has only *pote*, with a blank space following it sufficient for five or six letters. K. u. S. and Hu. have simply *potest*; but this seems too absolute; there could be nothing to prevent a woman *selecting* her brother or uncle as her tutor.

§ 158. § 3, tit. I. afd. Comp. iii, §§ 21, 27; Vlp. xi, 9.

- 159 Est autem capitis deminutio prioris capitis permutatio.<sup>1</sup>  
 eaque tribus modis accidit: nam aut maxima est capitis  
 deminutio, aut minor, quam quidam mediam uocant, aut  
 160 minima. Maxima est capitis deminutio cum aliquis simul  
 et ciuitatem et libertatem amittit; quae accidit incensis<sup>1</sup> *qui*  
*ex forma censuali* uenire iubentur. quod ius — — — —  
 — — — — *ex lege* — — — — —,<sup>2</sup> *qui contra eam*  
 legem in urbe Roma *domicilium* habuerint: item feminae<sup>3</sup>  
 quae ex senatusconsulto Claudiano ancillae fiunt eorum  
 dominorum, quibus inuitis et denuntiantibus nihilo minus<sup>4</sup>  
 161 cum seruis *eorum* coierint. Minor siue *media* est capitis

- 159 By *capitis deminutio* is meant the changing of one's former  
*caput*. And it occurs in three ways; for every *capitis*  
*deminutio* is either of the highest degree, of the lesser (which  
 160 some call intermediate), or of the lowest. It is of the  
 highest degree when a man loses at once both citizenship and  
 freedom; as happens to persons who have wilfully evaded  
 inscription in the censorial register, and consequently, by the  
 rules of the census-taking, are ordered to be sold as slaves.  
 It occurs also — — — — — who, in contravention  
 of the statute, have taken up their abode within the burgh-  
 limits of Rome. A woman, too, according to the Claudian  
 senatusconsult, becomes the slave of him with whose male  
 slave she has been carrying on an improper intimacy, against  
 the will and in spite of the formal warnings of his owner.  
 161 There is lesser or intermediate *capitis deminutio* when citizen-

§§ 159-164. Comp. tit. I. *DE CAPITIS*  
*MINVTIONE* (i, 16).

§ 159. Pr. tit. I. afd. Comp. Vlp. xi, 10; Boeth. in *Cic. Top.* ii, 4, § 18 (ed. Baiter, p. 302); Paul. *ex Festo*, v. *Deminutus capite* (Bruns, p. 240).

<sup>1</sup> Gai. (*ad ed. prov.*) in fr. 1, D. *de cap. min.* (iv, 5), has *status permutatio*; and this is substituted by K. u. S. and Hu. for the *cap. perm.* of the ms.

By *caput* is to be understood the family position of a citizen. It is sometimes defined as a man's position in regard to freedom, citizenship, and family rights; but the two first came under consideration only as affecting the last.

§ 160. Comp. Vlp. xi, 11; § 1, tit. I. afd.; Boeth. as in note to last par.

<sup>1</sup> Comp. *Cic. pro Caec.* xxxiv, 99; Dion. Hal. iv, 15; Vlp. xi, 11.

<sup>2</sup> Nearly two lines (p. 44, ll. 1-3), with exception of *ex lege*, are illegible in the ms. It has been suggested—and M. (K. u. S. p. xix) and Hu. adhere to the view—that the allusion may have been to the provision in the Aelia-Sentian law that deditecian-freedmen should not reside in Rome under penalty of being again reduced to slavery; see § 27. The difficulty, as Gou. properly observes, is that it could not be said of such a freedman—*simul ciuitatem et libertatem amittit*; for he was not a citizen.

<sup>3</sup> Comp. § 91; Vlp. xi, 11; § 1, I. *de success. sublat.* (iii, 12).

<sup>4</sup> So Hu.; the ms. has *dominis*, omitted by P. and K. u. S. as a gloss.

§ 161. § 2, tit. I. afd. Comp. § 128, note 2; Vlp. xi, 12; Boeth. as in note to § 159.

deminutio cum ciuitas amittitur, libertas retinetur; quod  
 162 accidit ei cui aqua et igni interdictum fuerit. Minima est  
 capitis deminutio cum et ciuitas et libertas retinetur, sed  
 status hominis commutatur; quod accidit in his qui adopt-  
 antur, item in his quae coemptionem faciunt, et in his qui  
 mancipio dantur quique ex mancipatione manumittuntur;  
 adeo quidem ut quotiens quisque mancipetur *ut*<sup>1</sup> manumit-  
 163 tatur, totiens capite deminuat. Nec solum maioribus  
 deminutionibus ius agnationis corrumpitur, sed etiam minima;  
 et ideo si ex duobus liberis alterum pater emancipauerit, post  
 obitum eius neuter alteri agnationis iure *tutor esse* poterit.  
 164 Cum autem ad agnatos tutela pertineat, non simul ad  
 omnes pertinet, sed ad eos tantum qui proximo gradu sunt.  
 164a— — — — —

ship is lost but liberty retained; which happens to him who is  
 162 interdicted fire and water. There is *capitis deminutio* of the  
 lowest degree when both citizenship and liberty are retained, and  
 only the status or condition of the individual [in private life]  
 is changed; it happens in the case of persons who are adopted,  
 of women who perform coemption, and of individuals who are  
 given *in mancipium* and manumitted therefrom; for as often  
 as there is mancipation with a view to manumission, so often  
 163 is there a *capitis deminutio*. It is not by the greater *capitis*  
*deminutiones* alone that the right of agnation is destroyed, but  
 even by that of the lowest degree; consequently, if a father  
 emancipate one of two children, neither of them can be the  
 other's tutor by right of agnation after the father's death.  
 164 Although it is true that the right of tutory belongs to a  
 pupil's agnates, yet it does not belong to all of them, but only  
 164a to those who are nearest of degree. [*Failing agnates, it*  
*[passed by the law of the Twelve Tables to the gens; but the*  
*[rights of the gens in this respect have long ago gone into disuse.]*

§ 162. Comp. Vlp. xi, 13; § 3, tit.  
 I. aff.; Boeth. as in note to §  
 159.

<sup>1</sup> So P.; the ms. and K. u. S. have  
*aut*; Hu. [*aut ut remancipatur*] *aut*  
*ut manumittatur*.

§ 163. Comp. Vlp. xi, 13; § 3, I. *de leg.*  
*agn. tut.* (i, 15).

§ 164. § 7, tit. I. aff.

§ 164a. The first 17 lines of p. 45 of  
 the ms. are almost entirely illegible.  
 There is reason to believe they con-  
 tained a reference to the tutory  
 exercised by the *gens* on failure of  
 agnates; see iii, 17. That by the

Twelve Tables the tutory-at-law of a  
 pupil passed on that event to his  
*gens* is nowhere expressly stated.  
 But we know (iii, 17) that failing  
 agnates a man's succession devolved  
 on his *gens*; and it was a general  
 principle that, except when an in-  
 heritance fell to a woman, the rights  
 of succession and tutory went to-  
 gether (§ 165). Besides, we have to  
 guide us the analogy of the curatory  
 of a lunatic, which went to his  
 agnates, and failing them to his  
*gens*; see Cic. *de Inv.* II, i, 148; fr.  
 53, pr. D. *de V. S.* (i, 16).



- 165 Ex eadem lege duodecim tabularum libertarum et in-  
 puberum libertorum *tutela* ad patronos liberosque eorum  
 pertinet; *quae et ipsa* tutela legitima uocatur, non (*quia nomi-*  
*(natim)* ea lege de hac tutela (*cauetur, sed*) *quia* proinde accepta  
 est per interpretationem atque si uerbis legis *introduc*<sup>1</sup>  
*ta* esset: eo enim ipso (*quod hereditates*) libertorum libertarum-  
 que, si intestati decessissent, iusserat lex ad patronos liberosue  
 eorum pertinere, crediderunt ueteres<sup>2</sup> uoluisse legem etiam  
 tutelas ad eos pertinere, quia et agnatos, quos ad hereditatem  
 uocauit, eosdem et tutores esse iusserat.
- 166 Exemplo patronorum receptae sunt et aliae tutelae quae  
 fiduciariae uocantur, id est, quae ideo nobis competunt quia  
 liberum caput mancipatum nobis uel a parente uel a coemp-

- 165 By the same law of the Twelve Tables the tutory of freed-  
 women and of freedmen under puberty belongs to their patrons  
 and their patrons' children. This tutory likewise is spoken  
 of as a tutory-at-law. Not, however, *because it is expressly*  
*mentioned* in the Tables, but because it has been recognised  
 by interpretation as fully as if it had been so mentioned; for  
 inasmuch as it was declared by the Tables *that the inheritances*  
*of freedmen and freedwomen dying intestate should belong to*  
*their patrons and patrons' children*, the old jurists concluded  
 that it must be the intent of the statute that the tutory of  
 such freedmen and freedwomen should go in the same direc-  
 tion, seeing that, when it calls agnates to a succession, it at  
 the same time confers upon them the right of tutory.
- 166 On the analogy of that of patrons, certain other tutories  
 have been recognised which are called fiduciary, *i.e.* which are  
 competent to us as manumitters of a free person mancipated

§ 165. Comp. tit. I. *DE LEGITIMA PATRONORVM TUTELA* (i, 17), from which the words in ital., illegible in the ms., are supplied; Vlp. xi, 3.

<sup>1</sup> So Hu. and K. u. S.; the ms. has *accepta*; P. *praecepta*.

<sup>2</sup> See § 144, note 2.

§§ 166-184. Comp. tits. I. *DE LEGITIMA PARENTVM TUTELA* and *DE FIDUCIARIA TUTELA* (i, 18, 19). In the ms., immediately after *exemplo patronorum* in beginning of § 166, we have the words *de fiduciaria*, probably an unfinished rubric.

§ 166. Comp. §§ 115, 172, 175, 195a; Vlp. xi, 5; tits. I. afd. K. u. S., on the authority of Inst. i, 18, and § 172,

below, make an interpolation, and render the par. thus:—*Exemplo patronorum receptae sunt et aliae tutelae, quae et ipsae legitimae uocantur. nam si quis filium aut filiam, nepotem aut neptem ex filio, et deinceps alteri ea lege mancipio dedit ut sibi remanciparetur, deinde remancipatum remancipataeue manumisit, legitimus eorum tutor erit. Sunt et aliae tutelae quae fiduciariae, etc.* Hu. (in his last edition) adopts this addition; and makes the *sunt et aliae* the commencement of a separate par. (§ 166a). But, looking at the language of § 175, it is doubtful whether this be justified.

- 167 tionatore manumiserimus. Sed latinarum et latinorum  
 inpu<sup>er</sup>um *tutela non omni modo ad manumissores libertinorum*<sup>1</sup>  
 pertinet, sed ad eos quorum ante manumissionem ex iure  
 Quiritium [*fu<sup>er</sup>unt: unde si ancilla ex iure Quiritium*]<sup>2</sup> tua  
 sit, in bonis mea, a me quidem solo, non etiam a te manumissa  
 latina fieri potest, et bona eius ad me pertinent; sed eius  
 tutela tibi competit: nam ita lege Iunia cauetur. itaque si  
 ab eo cuius et in bonis et ex iure Quiritium ancilla fuerit  
 facta sit latina, ad eundem et bona et tutela pertinent.
- 168 Agnatis et patronis et liberorum capitum manumissoribus  
 permissum est feminarum tutelam alii in iure cedere;<sup>1</sup> pupil-  
 lorum autem tutelam non est permissum cedere, quia non
- 169 uidetur onerosa, cum tempore pubertatis finiatur.<sup>2</sup> Is
- 170 autem cui ceditur tutela cessicius uocatur. quo mortuo  
 aut capite deminuto reuertitur ad eum tutorem tutela qui  
 cessit; ipse quoque qui *cessit* si mortuus aut capite deminutus

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167 to us either by a parent or a coemptionator. But the  
 tutory of Junian latin<sup>s</sup> under puberty, ~~whether male or~~  
~~female~~, does not in all cases belong to their manumitters, but  
 rather to those who before their manumission were their  
 quiritarian owners. *Therefore, if a woman-slave be yours in*  
*quiritarian* and mine in bonitarian right, it is I alone, not  
 you, that can by manumission make her a latin, and her  
 estate will be mine; but her tutory will belong to you: for so  
 it is provided by the Junian law. Accordingly, if a woman  
 have been made a latin by a person who held her both in  
 bonitarian and quiritarian ownership, her estate [on her death]  
 and her tutory [during her life] will both be his.

- 168 Agnates, patrons, and manumitters of free persons are  
 permitted to transfer the tutory of females to another person  
 by cession in court; but that of male pupils cannot be ceded,  
 for, as it terminates with the arrival of puberty, it cannot be
- 169 regarded as burdensome. He to whom a tutory is thus
- 170 ceded gets the name of *tutor cessicius*. On his death or  
*capitis deminutio* it reverts to him by whom it had been  
 ceded; while if it be the latter that dies or is *capite deminutus*,

§ 167. Comp. § 35; iii, 56; Vlp. xi. 19.

<sup>1</sup> The ms. has *libertineorum*; P. omits the word; K. u. S. make it *eorum*; Hu. *libertorum eorum*.

<sup>2</sup> These words are the suggestion of Goesch., approved by most eds.;

they have obviously been omitted *per incuriam*.

§ 168. Comp. Vlp. xi, §§ 6, 8, 17.

<sup>1</sup> Comp. ii, 24.

<sup>2</sup> Comp. § 196.

§§ 169, 170. Comp. Vpl. xi, 7.

p. 486 "freedwomen<sup>E</sup>  
 and of latin freedmen'  
 under puberty"

- sit, a cessicio tutela discedit et reuertitur ad eum qui post eum qui cesserat secundum gradum in ea tutela habuerit.
- 171 Sed quantum ad agnatos pertinet nihil hoc tempore de cessicia tutela quaeritur, cum agnatorum tutelae in feminis
- 172 lege Claudia<sup>1</sup> sublatae sint. Sed fiduciarios quoque quidam putauerunt cedendae tutelae ius non habere, cum ipsi se oneri subiecerint. quod etsi placeat, in parente tamen qui filiam neptemue aut proneptem alteri ea lege mancipio dedit ut sibi remanciparetur, remancipatamque manumisit, idem dici non debet, cum is et legitimus tutor habeatur, et non minus huic quam patronis honor praestandus sit.
- 173 Praeterea senatusconsulto mulieribus permissum est in absentis tutoris locum alium petere; quo petito prior desinit;
- 174 nec interest quam longe absit is tutor. sed excipitur ne in absentis patroni locum liceat libertae tutorem petere.

- 
- it passes from the *cessicius* and reverts to him who is entitled
- 171 to it as next of degree after the cedent. So far, however, as agnates are concerned, there can nowadays never be any question about this *cessicia tutela*, seeing that the agnatic tutory of women has been abolished by the Claudian law.
- 172 Some jurists have been of opinion that fiduciary tutors have no power of ceding their office, since they have subjected themselves to the burden by their own act. Even if this opinion be correct, the rule will not apply to a parent who has given his daughter or granddaughter or great-granddaughter to a third party *in mancipium*, on the express condition of remancipation to himself, and who has manumitted her on such remancipation; for he is regarded as also a tutor-at-law, and is entitled to no less consideration than a patron.
- 173 Moreover, by the senatusconsult, women are allowed to apply for the appointment of a new tutor in room of one who is absent; the latter's tutory comes to an end by the new appointment, apart from any consideration of how far away
- 174 he is. There is an exception, however, in the case of a freedwoman; for she cannot thus obtain the supercession of

§ 171. Comp. § 157; Vlp. xi, 8.

<sup>1</sup> See § 157, note.

§ 172. Comp. §§ 132, 166, 175, 192; tit. I. *de leg. parent. tut.* (i, 18).

§§ 173, 174. Comp. Vlp. xi, 22. The author and date of the Sct. referred to cannot be determined with certainty. It seems, judging from §§

173-182, and Vlp. xi, §§ 20-23, to have dealt pretty comprehensively with the subject of the tutory of women, and may possibly have been the same enactment that is elsewhere referred to under the name of *lex Claudia*; comp. § 157, note 1.

- 175 Patroni autem loco habemus etiam parentem, qui ex eo quod ipse sibi remancipatam filiam neptemue aut proneptem manumisit, legitimam tutelam nactus est. huius quidem liberi fiduciarii tutoris loco numerantur; patroni autem liberi eandem tutelam adipiscuntur quam et pater eorum habuit.
- 176 Sed aliquando etiam in patroni absentis locum permittitur tutor rem petere, ueluti ad hereditatem adeundam. Idem senatus
- 177 censuit et in persona pupilli patroni filii. Item<sup>1</sup> lege Iulia de maritandis ordinibus ei quae in legitima tutela pupilli sit permittitur dotis constituendae gratia a praetore urbano tutorem
- 179 petere; sane [enim]<sup>1</sup> patroni filius, etiamsi impubes sit, libertae efficitur tutor, quamquam in nulla re auctor fieri potest, cum ipsi nihil permissum sit sine tutoris auctoritate agere.
- 180 Item si qua in tutela legitima furiosi aut muti sit, permittitur ei senatusconsulto dotis constituendae gratia tutorem petere.

- 175 her absent patron. And under the word patron we here include a parent who, by the mere fact of manumission of a daughter, granddaughter, or great-granddaughter who has been remancipated to him, has thereby become her tutor-at-law. The children of such a parent are accounted fiduciary tutors; but the children of a patron succeed to a tutory of the
- 176 same character as their father's. Yet sometimes a woman is allowed to apply for the appointment of a tutor to herself in place even of an absent patron; for instance, when she desires
- 177 to enter upon an inheritance. The senate has granted the same relief in such circumstances to a woman in the tutory
- 178 of her patron's son, himself a pupil. Further, by the Julian law regulating the marriages of the orders, a woman in the tutory-at-law of a pupil may petition the urban praetor to appoint her an [interim] tutor for the purpose of making a
- 179 dotal provision; (for there is no question that a patron's son, even though under puberty, becomes tutor of his father's freedwoman, notwithstanding that, as he cannot act in any matter without his own tutor's *auctoritas*, he cannot be *auctor*
- 180 in any of her affairs.) A woman likewise who is in the tutory of a lunatic or a mute is allowed by the senatusconsult to apply for a tutor for the purpose of making a dotal

§ 175. Comp. §§ 166, 172; tit. I. *de fiduc. tut.* (i, 19).

§§ 176, 177. Comp. Vlp. xi, 22.

§ 178. Comp. Vlp. xi, 20.

<sup>1</sup> So P.; the ms. seems to have *nam e lege Julia*; K. u. S. and Hu. *nam et lege Julia*. As re-

gards this Julian law see § 145, note 1.

§ 179. Comp. § 13, I. *de excus. tut.* (i, 25).

<sup>1</sup> This word is interpolated because the par. seems to be a parenthetical explanation.

§ 180. Comp. Vlp. xi, 21.



181 Quibus casibus saluam manere tutelam patrono patronique  
 182 filio manifestum est. Praeterea senatus censuit ut si tutor  
 pupilli pupillaeue suspectus a tutela remotus sit, siue ex iusta  
 causa fuerit excusatus, in locum eius alius tutor detur, quo  
 183 facto prior tutor amittit tutelam. Haec omnia similiter et  
 Romae et in prouinciis obseruantur; *scilicet* [ut Romae a prae-  
 [tore]<sup>1</sup> et in prouinciis a praeside prouinciae tutor (*peti debeat*).<sup>2</sup>  
 184 Olim cum legis actiones<sup>1</sup> in usu erant, etiam ex illa causa  
 tutor dabatur, si inter tutorem et mulierem pupillumue lege  
 agendum erat. *nam quia ipse tutor* in re sua auctor esse non  
*poterat*, alius dabatur, quo auctore legis actio perageretur: qui  
 dicebatur praetorius tutor, quia a praetore urbano dabatur.  
 sed post sublatas legis actiones quidam putant hanc speciem  
 dandi tutoris in usu esse desiisse; (*aliis uero*)<sup>2</sup> placet adhuc in  
 usu esse si legitimo iudicio<sup>3</sup> agatur.

181 settlement. But in all such cases, as is manifest, the [per-  
 manent] tutory of the patron or his son remains undisturbed.  
 182 Further, the senate has ordained that if the tutor of a male or  
 female pupil be removed from office as suspect, or be excused  
 on some good ground from undertaking it, another shall be  
 appointed in his place, on whose appointment the original  
 183 tutor loses his tutory. Upon all these matters the rules are  
 the same in the provinces as in Rome; *in the latter* the  
 application for appointment of a tutor must be made to the  
*praetor*, in the former to the governor.

184 In the olden time, when the actions-of-the-law were in use,  
 it was the practice to appoint an [interim] tutor when a  
 process was instituted between an [ordinary] tutor and his  
 female or pupil ward: as the [ordinary] tutor could not be  
*auctor* in a matter in which he himself was concerned, another  
 was appointed, with whose *auctoritas* the action-of-the-law  
 might be carried through all its stages, and who was called a  
 praetorian tutor, because his nomination proceeded from the  
 urban praetor. But, after the actions-of-the-law were  
 abolished, the practice of appointing a tutor in this way, accord-  
 ing to some authorities, went altogether into disuse, *while*  
*according to others* it is still competent in a *legitimum iudicium*.

§ 182. Comp. Vlp. xi, 23.

§ 183. Comp. Vlp. xi, 20.

<sup>1</sup> So K. u. S. P. has—[nisi] *scili-  
cet* [quod Romae a praetore urbano  
uel peregrino praetore] et, etc.

<sup>2</sup> These words are illegible, with  
exception of the *pe* of *peti*; but  
their propriety is obvious.

§ 184. Comp. Vlp. xi, 24; § 3, I. *de  
auct. tut.* (i, 21); pr. I. *de his p.  
quos agere poss.* (iv, 10).

<sup>1</sup> Comp. iv, §§ 11, 12.

<sup>2</sup> The first three letters of *aliis* are  
quite legible. K. u. S. and Hu.  
have *aliis autem*.

<sup>3</sup> Comp. iv, 104.

- 185 Si cui nullus omnino tutor sit, ei datur in urbe Roma ex lege Atilia<sup>1</sup> a praetore urbano et maiore parte tribunorum plebis, qui Atilianus tutor uocatur; in prouinciis uero a prae-
- 186 sidibus prouinciarum ex lege Iulia et Titia.<sup>2</sup> Et ideo si cui testamento tutor sub condicione aut ex die certo datus sit, quamdiu condicio aut dies pendet tutor dari potest; item si pure datus fuerit, quamdiu nemo heres existat, tamdiu ex his legibus tutor petendus est; qui desinit tutor esse posteaquam
- 187 aliquis ex testamento tutor esse coeperit. Ab hostibus quoque tutore capto ex his legibus tutor peti debet, qui desinit tutor esse si is qui captus est in ciuitatem reuersus fuerit: nam reuersus recipit tutelam iure postliminii.
- 188 Ex his apparet quot sint species tutelarum. si uero

- 185 If a pupil have no tutor at all, then in Rome, in terms of the Atilian law, one is given him by the urban praetor and a majority of the plebeian tribunes, who is called an Atilian tutor; while in the provinces one is appointed to him by the
- 186 governor, in terms of the Julian and Titian law. If therefore any one have a tutor appointed to him by testament, but only conditionally or as from a certain date, a tutor may be given him by the magistrate until the condition is fulfilled or the time has arrived. So also, although the testamentary appointment have been unconditional, so long as no heir has come forward a tutor may be applied for under those statutes. But [in all these cases] the magisterially appointed tutor ceases to hold that position the moment there is one qualified
- 187 under the testament. Further, if a tutor be taken captive by an enemy, application should be made under those statutes for the appointment of another, who will cease to hold office when the former has recrossed the frontier; for on his return he recovers his tutory *iure postliminii*.
- 188 From what has been said it is clear how many species there are of tutories. But if we proceed to inquire in what number

§§ 185-187. Comp. tit. I. DE ATILIANO TVTORE (i, 20).

§ 185. Pr. tit. I. afd. Comp. Vlp. xi, 18.

<sup>1</sup> The date is unknown, but before 568 | 186; see Liv. xxxix, 19.

<sup>2</sup> Th. (i, 20, pr.) says these were two separate laws. Hu. (*Beitraege* pp. 31, 32) thinks a *lex Iulia* was enacted in the first instance by Augustus (Octavian) in 722 | 32, applying the Atilian law to the imperial provinces; and that it was

immediately thereafter extended by M. Titius, *cos. suff.*, to the popular ones. In some at least of the semi-independent *municipia* the appointment seems to have been by the municipal authorities, as prescribed by the charter; see *lex Salpens.* c. 29 (Bruns, p. 123), and note 2 to § 55, above.

§ 186. § 1, tit. I. afd.

§ 187. § 2, tit. I. afd.

§ 188. Comp. Vlp. xi, 2; Paul. fr. 7, pr. D. *de cap. min.* (iv, 5).

quaeramus in quot genera hae species deducantur, longa erit disputatio: nam de ea re ualde ueteres<sup>1</sup> dubitauerunt, nosque<sup>2</sup> diligentius hunc tractatum executi sumus et in edicti interpretatione et in his libris quos ex Quinto Mucio fecimus. hoc tantisper<sup>3</sup> sufficit admonuisse, quod quidam quinque genera esse dixerunt, ut Q. Mucius;<sup>4</sup> alii tria, ut Serv. Sulpicius;<sup>5</sup> alii duo, ut Labeo;<sup>6</sup> alii tot genera esse crediderunt quot etiam species essent.

- 189 Sed inpuberes quidem in tutela esse omnium ciuitatum iure contingit; quia id naturali rationi conueniens est, ut is qui perfectae aetatis non sit alterius tutela regatur; nec fere ulla ciuitas est in qua non licet parentibus liberis suis inpuberibus *testamento tutorem*<sup>1</sup> dare; quamuis, ut supra diximus,<sup>2</sup> soli ciues Romani uideantur liberos<sup>3</sup> suos in potestate

of genera those species can be ranged, we get into a fertile field of dispute, the matter being one about which the old jurists seem to have had much hesitation, and which we have discussed very fully in our treatise on the Edict and our commentary on Quintus Mucius. It is sufficient here to observe that some, as for instance Quintus Mucius, hold that there are five such genera; that others, like Servius Sulpicius, limit the number to three, and others again, like Labeo, to two; while some hold the number of genera to be equal that of the species.

- 189 That persons under the age of puberty should be in tutelage is the law everywhere; for it is in accordance with natural reason that he who is not of perfect age should be controlled by the tutory of another. Indeed, there is scarcely any country that does not recognise the right of a parent to appoint *a testamentary tutor* to his children under puberty; although, as already said, it is only citizens of Rome that have their

<sup>1</sup> See § 144, note 2.

<sup>2</sup> So K. u. S.; the ms. and P. have *nos qui*; Hu. *nos quia*.

<sup>3</sup> The ms. reads *hoc totum tantisper*; for *totum* Hu. proposes *solum*, and P. *tantum*; none of the three words seems appropriate. Mommsen's suggestion of *loco* (K. u. S. footnote) is more probable.

<sup>4</sup> Quintus Mucius Scaevola, the younger, consul in 659 | 95, according to Cicero the greatest jurist of his day.

<sup>5</sup> Servius Sulpicius Rufus, consul

in 703 | 51, and according to Cicero not much behind Q. Mucius in the practice of his profession, while excelling him as a scientific jurist.

<sup>6</sup> About Labeo, see § 196, note 1.

§ 189. Comp. § 6, tit. I. affd.

<sup>1</sup> The ms. has *co.st.tut.*, which P. thinks may be a corruption of *cust. u. tut.*, i.e. *custodes uel tutores*.

<sup>2</sup> See § 55.

<sup>3</sup> The ms. and Hu. have *tantum* before this word.

- 190 habere. Feminas uero perfectae aetatis in tutela esse fere nulla pretiosa ratio suasisse uidetur: nam quae uulgo creditur, quia leuitate animi plerumque decipiuntur et aequum erat eas tutorum auctoritate regi, magis speciosa uidetur quam uera; mulieres enim<sup>1</sup> quae perfectae aetatis sunt ipsae sibi negotia tractant, et in quibusdam causis dicis gratia tutor interponit auctoritatem suam; saepe etiam inuitus auctor fieri a praetore
- 191 cogitur. Unde cum tutore nullum ex *tutela* iudicium mulieri datur: at ubi pupillorum pupillarumue negotia tutores tractant, eis post pubertatem tutelae iudicio rationem reddunt.
- 192 Sane patronorum et parentum legitimae tutelae uim aliquam habere intelleguntur eo quod hi neque ad testamentum faciendum,<sup>1</sup> neque ad res Mancipi alienandas,<sup>2</sup> neque ad obligationes suscipiendas<sup>3</sup> auctores fieri coguntur, praeterquam si magna causa alienandarum rerum Mancipi obligationisque suscipiendae interueniat. eaque omnia ipsorum causa constituta

- 190 children in their *potestas*. But it is difficult to discover any good reason why women of full age should be in tutelage; that commonly assigned—that owing to their weakness of judgment they are easily imposed upon, and therefore ought, in common fairness to them, to be guided by the *auctoritas* of a tutor—is more specious than true. For women of perfect age manage their business affairs for themselves; the interposition of tutorial *auctoritas* in some cases is merely for form's sake; for not unfrequently their tutor is compelled by
- 191 the praetor to be *auctor* whether he will or not. It is for this reason that a woman has no *tutelae iudicium* against her tutor; whereas when tutors administer the affairs of pupils, whether male or female, they must, on their attaining puberty,
- 192 render them an account in an action of that sort. The tutories-at-law of patrons and parents, on the other hand, derive such efficacy as they possess from the fact that such persons cannot be compelled to grant their *auctoritas* either to the execution of a testament by their female wards, or the alienation by them of *res Mancipi*, or the undertaking by them of obligations, unless, as regards alienation or obligation, there be a weighty reason to justify it. And all this is in the

§ 190. Comp. § 144; Vlp. xi, 1; Cato apud Liv. xxxiv, 2; Cic. *pro Mur.* xii, 27; Isidor. *Orig.* ix, 7, § 30.

<sup>1</sup> Comp. ii, 122; Vlp. xi, §§ 25, 27.

§ 191. Comp. § 7, tit. I. affd.

§ 192. Comp. Vlp. xi, 27; Cic. *pro Flacco*, xxxiv, 84.

<sup>1</sup> Comp. ii, §§ 112, 118, 122; iii, 43; Vlp. xx, 16; xxix, 23.

<sup>2</sup> Comp. ii, §§ 47, 80; Paul. in Fr. Vat. §§ 1, 45.

<sup>3</sup> Comp. iii, §§ 108, 176; Cic. *pro Flacco*, xxxv, 86; *pro Caec.* xxv, 72.



- sunt, ut, quia ad eos intestatarum mortuarum hereditates pertinent, neque per testamentum excludantur ab hereditate, neque alienatis pretiosioribus rebus susceptoque aere alieno minus locuples ad eos hereditas perueniat. Apud peregrinos non similiter ut apud nos in tutela sunt feminae; sed tamen plerumque quasi in tutela sunt: ut ecce lex Bithynorum,<sup>1</sup> si quid mulier *contrahat, maritum auctorem esse iubet*<sup>2</sup> aut filium eius puberem.
- 194 Tutela autem liberantur ingenuae quidem trium [*liberorum iure*,<sup>1</sup> *libertinae uero quattuor, si in patroni*] liberorumque eius legitima tutela sint; nam [et ceterae] quae alterius generis tutores habent, [uelut Atilianos aut fiduciarios], trium liberorum iure tutela liberantur. Potest autem pluribus modis libertina alterius generis [*tutorem*] habere, ueluti si a femina manumissa sit; tunc enim e lege Atilia petere debet tutorem,
- 195

- interest of the patrons and parents themselves; in order that, as they are entitled to the succession of their female wards dying intestate, they may neither be excluded from it by will, nor find it diminished in value by the alienation of the more precious articles belonging to it or the burdening of it with debt. Amongst peregrins women are not in tutelage exactly as with us, although very often in a sort of quasi-tutelage; a law of the Bithynians, for instance, requires that, if a woman enter into a contract, her husband or a son above puberty shall be *auctor*.
- 194 Women of free birth are released from tutory in right of their having three children. [*Freedwomen in the tutory-at-law of their patrons or patrons' children are released from it in right of four;*] but if they have any other sort of tutors, Atilian, for instance, or fiduciary, they also are released in right of three. For there are various ways in which a freedwoman may have another sort of tutor than her patron; for example, if it be by a woman that she has been manumitted she must have a tutor appointed under the Atilian law, or in the
- 195

§ 193. Comp. Cic. *pro Flacco*, xxx, § 74.

<sup>1</sup> Bithynia was originally one of the popular provinces, but by Hadrian eventually made an imperial one.

<sup>2</sup> Reading doubtful, the ms. running — *siquitmul. hat. marit. autēē. inuet.*

§ 194. Comp. § 145; iii, 44; Vlp. xxix, 3. The words in ital. are due to

Hollweg, and have been adopted substantially by all subsequent eds. The *et ceterae* and *uelut Atil. aut fiduc.* are omitted by P. as glosses.

<sup>1</sup> The concession of privileges to those who were mothers of a certain number of children was one of the means provided in the Papia-Popaeian law for encouraging marriage; see § 145, note 1.

§ 195. Comp. § 185.

- uel in prouinciis e [*lege Iulia et*] Titia: *nam* in patronae  
 195a *tutela*<sup>1</sup> esse non potest. Item si a masculo manumissa  
 [*fuerit*] et auctore eo coemptionem fecerit, deinde remancipata  
 et manumissa sit, patronum quidem habere tutorem desinit,  
 incipit autem habere eum tutorem a quo manumissa est, qui  
 195b fiduciarius dicitur. Item si patronus (*eiusue filius*)<sup>1</sup> in  
 adoptionem se dedit, debet *liberta* (*e lege Atilia uel Iulia et*)<sup>2</sup>  
 195c Titia tutorem petere. Similiter ex iisdem legibus petere  
 debet tutorem *liberta* si patronus decesserit, *nec ullum* uirilis  
 sexus liberorum in familia *reliquerit*.
- 196 Masculi (*autem cum*) puberes esse coeperint tutela liber-  
 antur. (*puberem autem*) Sabinus<sup>1</sup> quidem et Cassius<sup>1</sup> *ceteri-*  
*que nostri praeceptores*<sup>1</sup> eum esse putant qui habitu corporis

- provinces under the Julian and Titian, seeing she cannot be  
 195a in the tutory of her patroness. Again, if she have been  
 manumitted by a male, and with his *auctoritas* have performed  
 coemption, and have thereafter been remancipated and manu-  
 mitted, she ceases to have her patron as tutor, and begins to  
 have in that capacity him by whom she was latterly manu-  
 195b mitted, and who is called her fiduciary tutor. So if a  
 patron or his son have given himself in adoption, the freed-  
 woman must have a tutor appointed under either the Atilian  
 195c or Julian and Titian law. In like manner she must apply  
 for a tutor under these same laws if her patron be dead, no  
 male member of his family surviving him.
- 196 Males are freed from tutelage on attaining puberty.  
 Sabinus, Cassius, and the other leaders of our school hold *him*  
*to have arrived at puberty* who manifests it by his bodily

<sup>1</sup> Comp. Vlp. in fr. 2, pr. D. *de R. I.* (l. 17).

§ 195a. Comp. §§ 115, 166.

§ 195b. Comp. Vlp. xi, 9; § 4, I. *quib. mod. tut. fin.* (i, 22).

<sup>1</sup> Suggested by Stud. as corresponding fairly to the traces visible in the MS.

<sup>2</sup> Stud., in a footnote, observes that the MS. has faint traces of something like *eleptitiaet*.

§ 195c. Comp. § 179.

§ 196. Comp. tit. I. *QVIBVS MODIS TUTELA FINITVR* (i, 22); Vlp. xi, 28.

<sup>1</sup> The reference in the words *nostri praeceptores* and *diuersae scholae auctores*—and it is of frequent recurrence—is to the two rival schools or sects of the Sabinians or

Cassians and the Proculians; comp. Pompon. in fr. 2, § 47, D. *de O. I.* (i. 2).

They both arose in the time of Augustus; the founder of the first being Ateius Capito, and his immediate successors Massurius Sabinus and Caius Cassius Longinus; that of the second being Antistius Labeo, and his successors Nerva the elder and Proculus. Pomponius says that Capito and his followers were conservative in their doctrine, Labeo and his school of a more critical spirit, and readier to innovate; the former were inclined to bow to authority, the latter to inquire for themselves. It can hardly be said, however, that this is always mani-

pubertatem ostendit, *id est eum* qui generare potest; sed in his qui pubescere non possunt, quales sunt spadones, eam aetatem esse spectandam cuius aetatis puberes fiunt; sed diuersae scholae auctores<sup>1</sup> annis putant pubertatem aestimandam, id est eum puberem esse existimant — — — —<sup>2</sup>.

197 — — — — — aetatem peruenerit in qua res suas tueri possit, sicuti apud peregrinas gentes custodiri superius

development, in other words, who can procreate; but that in those who can never do so, eunuchs for example, that age is to be regarded as definitive at which persons usually reach puberty. The authorities of the other school think that puberty ought always to be dealt with as a matter of years, and hold him to have reached it [*who has attained the age of fourteen*]. — — — — —.

197 — — — — —. [*By the Plaetorian law it is provided that in certain cases a minor who has passed the years of pupillarity shall have the assistance of a curator appointed by the praetor; but his office lasts only until he has fulfilled the duty for which he has been appointed, and not until the [minor has] reached the age at which he can take care of his own affairs. This practice, as already said, prevails also in*

fest in the records of their controversies.

Gai. professed himself a Sabinian, but was not an indiscriminate adherent of the school.

Of the many treatises on the subject the best modern one is that of Dirksen (*die Schulen der Röm. Juristen*) in his *Beiträge zur Kunde des Röm. Rechts*, Leipz. 1825.

<sup>2</sup> The conclusion of the par. is on p. 53, the whole of which is illegible, but *qui XIII annos expleuit* is the likely reading; comp. § 168, Vlp. xi, 28. It is possible that on the same page Gai. may have mentioned some of the other modes of extinction of a tutory which we find enumerated in tit. I. afd.

§§ 197, 198. Comp. tit. I. *DE CVRATORIBVS* (i, 23). Part of the illegible p. 53 seems to have been devoted to the subject of curatory. In the Epit. i, 8, we have—*Peractis pupillaribus annis, quibus tutores absoluuntur, ad curatores ratio minorum incipit pertinere. Sub curatore sunt minores aetate, maiores euersores, insani. Hi qui minores sunt usque ad ui-*

*ginti et quinque annos impletos sub curatore sunt. Qui uero euersores aut insani sunt, omni tempore uitae suae sub curatore esse iubentur, quia substantiam suam rationabiliter gubernare non possunt.* For the reason stated in next note, however, this cannot be a correct representation of what was contained in the pages of Gaius. Comp. Vlp. tit. xii; Paul. iii, 4a, § 7.

§ 197. In the absence of the context the meaning of this par. is by no means clear. There is no previous allusion to curatory of minors above puberty among foreigners; § 189 refers to pupils, i.e. minors under puberty. In Rome the curatory of minors was introduced in certain cases by a *lex Plaetoria* of the sixth century u. c. (Cic. *de Offic.* iii, 15, § 61; Vlp. xii, 4), on which see Savigny, *Z. f. g. RW.* x, 232, and *Verm. Schr.* ii, 321; also Hu., *Z. f. RG.* xiii, 311. Marc. Aurelius made the hitherto exceptional practice a universal rule,—*statuit ut omnes adulti curatores accipiunt, non redditis causis* (Capi-tolin. in Marc. c. 10).

198 indicauimus. Ex isdem causis et in prouinciis a praesidibus earum curatores dari *solent*.<sup>1</sup>

199 Ne tamen et pupillorum et eorum qui in curatione sunt negotia a tutoribus curatoribusue consumantur aut deminuantur, curat praetor ut et tutores et curatores eo nomine satisfident.

200 sed hoc non est perpetuum; nam et tutores testamento dati satisfacere non coguntur, quia fides eorum et diligentia ab ipso testatore probata est; et curatores ad quos non e lege curatio pertinet, sed uel a consule uel a praetore uel a praeside prouinciae *dantur*, plerumque non coguntur satisfacere, scilicet quia satis *honesti* (*electi sunt*).

198 foreign countries. In the same cases curators are appointed in the provinces by the governors.

199 To prevent the destruction or dilapidation of the estates of pupils and ~~adolescent minors~~ by their tutors or curators, the praetor requires them to give their personal undertaking, backed by that of sureties, that nothing of the sort shall happen. But not universally; for not only are testamentary

200 tutors not compelled to do so, because their integrity and diligence have been approved by the testator himself, but curators who do not hold their office by mere devolution of law, but have been appointed by a consul, praetor, or provincial governor, are generally relieved from the necessity of giving such an undertaking, having in fact been selected because of their sufficient trustworthiness.

§ 198. The words *ex iisdem causis* doubtless refer to the cases enumerated in the Plaetorian law; for Gai. was writing this first book before the enactment of Marc. Aurel. referred to in last note.

<sup>1</sup> The ms. and previous eds. (except K. u. S.) have *uolunt* or *uoluit*, evidently a mistake.

§§ 199, 200. Comp. tit. I. *DE SATIS-DATIONE TUTORVM VEL CVRATORVM* (i, 24), from which the final words, *electi sunt*, are borrowed.

The words *satisfacere* and *satis-*

*datio* are of constant recurrence in the texts. Very exceptionally the simple undertaking of the party himself, technically *repromissio*, was held to amount to *satisfactio* (fr. 61, D. *de V. S.*, 1, 16); but usually sureties were required in addition (fr. 1, D. *qui satisfacere cogantur*, ii, 8); and this was invariably the case where the security was required by the praetor,—a pledge or hypothec could not be accepted instead (fr. 7, D. *de stipulat. praetor.* xlv, 5).

x p. 436, persons in curatory



## [COMMENTARIVS SECVNDVS.]

- 1 [*Superiore commentario de iure personarum*] exposuimus;  
 modo uideamus de rebus: quae uel in nostro patrimonio sunt,  
 uel extra nostrum patrimonium habentur.
- 2 Summa itaque rerum diuisio in duos articulos diducitur:  
 3 nam aliae sunt diuini iuris, aliae humani. Diuini iuris  
 4 sunt ueluti res sacrae et religiosae. sacrae sunt, quae  
 diis superis consecratae sunt; religiosae, quae diis Manibus  
 5 relictæ sunt. Sed sacrum quidem hoc solum existimatur  
*quod ex auctoritate populi Romani consecratum est*, ueluti lege  
 6 de ea re lata aut senatusconsulto facto. religiosum uero  
 nostra uoluntate facimus mortuum inferentes in locum no-  
 7 strum, si modo eius mortui funus ad nos pertineat. sed

- 1 In the preceding Commentary we have explained the law  
 concerning persons. Let us now turn our attention to things.  
 And these are either in our patrimony or beyond it, [*i.e.*  
 either capable or incapable of being subjected to a private  
 person's rights.]
- 2 The first division then of things is into two classes; for some  
 3 are of divine and others of human right. Of divine right are  
 4 those that are sacred and religious. Sacred are those con-  
 secrated to the gods above; religious those devoted to the gods  
 5 below. That alone is esteemed sacred which has been con-  
 secrated by authority of the state, say by a comitial enactment  
 6 or a senatusconsult passed for the purpose. But we can at  
 our own hand make ground belonging to us religious by burying  
 a corpse in it, provided we be the persons charged with the  
 7 funeral obsequies. It is generally held that ground in the

§§ 1-11. Comp. pr. §§ 1-10, tit. I. *DE  
 RERVM DIVISIONE* (ii, 1).

§ 1. The first line of p. 55 of the ms.  
 is blank. Comp. pr. tit. I. *afd.*,  
 from which the missing words are  
 supplied.

§§ 2, 3. Gai. in fr. 1, pr. D. *de diu. rer.*  
 (i, 8). Comp. iii. 97.

§ 4. Comp. § 8, tit. I. *afd.*

§ 5. Comp. Fest. v. *Sacer* (Bruns,  
 p. 261); § 8, tit. I. *afd.*

§ 6. Comp. Gell. iv, 9, § 8; § 9, tit. I.  
*afd.*

§ 7. Comp. i, 6; Front. *de controu.*  
*agr.* (ed. Lachm. p. 36); Th. ii, 1,  
 40.

in prouinciali solo placet plerisque solum religiosum non fieri, quia in eo solo dominium populi Romani est uel Caesaris, nos autem possessionem tantum uel usumfructum habere uidemur: utique tamen etiamsi non sit religiosum pro religioso habetur. item quod [in prouinciis]<sup>1</sup> non ex auctoritate populi Romani consecratum est, proprie sacrum non est, 8 tamen pro sacro habetur. Sanctae quoque res, ueluti muri 9 et portae, quodammodo diuini iuris sunt. Quod autem diuini iuris est, id nullius in bonis est: id uero quod humani (*iuris est plerumque alicuius in bonis est; potest autem et nullius in bonis esse: nam res hereditariae antequam aliquis* 9a (*heres existat nullius in bonis sunt.*) [9a] — — — — — 10 — domino. Hae autem quae humani iuris sunt aut publicae sunt aut priuatae. Quae publicae sunt nullius *uidentur* 11 in bonis esse; ipsius enim uniuersitatis esse creduntur. priuatae sunt quae singulorum sunt.

provinces cannot thus be made religious, as the ownership of it belongs either to the Roman people or to the emperor, private persons having only the possession or usufruct of it; but though it may not strictly be religious, it is at any rate regarded as quasi-religious. In the same way what is consecrated without the authority of the state [*i.e.* at a private party's own hand], is not properly speaking sacred, but is dealt with as 8 quasi-sacred. Holy places, such as a city's walls and gates, 9 are also in a manner of divine right. What is of divine right cannot be amongst any [private] person's belongings. But what is of human right *ordinarily does belong to some one; though it may belong to no one, as is the case with the items of an inheritance, which, until an heir has come forward,* 9a *are not in any person's estate.* [9a] — — — — — 10 — —. Things of human right are either public or private. 11 Those that are public are not regarded as belonging to individuals; they are held to belong to the corporate body itself. Those are private that belong to individuals.

<sup>1</sup> These words, according to M. (K. u. S. footnote), should be expunged as a gloss.

§ 8. Gai. (*lib. ii. Inst.*) in fr. 1, pr. D. *de diu. rer.* (i, 8); § 10, tit. I. affd.

§ 9. Gai. in fr. 1, pr. D. *de diu. rer.* (i, 8); comp. § 7, tit. I. affd. The

first eleven lines of p. 56 are entirely illegible; the words in ital., which are from the Dig. as quoted, may have occupied the first three or four.

§§ 10, 11. Gai. in fr. 1, pr. D. *de diu. rer.* (i, 8).

- 12 Quaedam praeterea res corporales sunt, quaedam incorporeales.  
 13 [*Corporales*] hae sunt quae tangi possunt, uelut fundus, homo, uestis, aurum, argentum et denique aliae res innumerabiles.  
 14 Incorporeales sunt quae tangi non possunt, qualia sunt ea quae in iure consistunt, sicut hereditas, ususfructus, obligationes quoquo modo contractae. nec ad rem pertinet [*quod in hereditate res corporales continentur; nam*] et fructus qui ex fundo percipiuntur corporales sunt, et id quod ex aliqua obligatione nobis debetur plerumque corporale (*est, ueluti*) fundus homo pecunia: nam ipsum ius successionis et ipsum ius utendi fruendi et ipsum ius obligationis incorporeale est. eodem numero sunt et iura praediorum urbanorum et rusticorum, (*quae etiam seruitutes uocantur.*) [14a] — — — *altius tollendi* — — — *luminibus vicini aedium, aut non*

- 12 Further, some things are corporeal, some incorporeal.  
 13 Corporeal are those that are tangible, such as land, a slave, a  
 14 garment, gold, silver, and other things innumerable. Incorporeal are those that are intangible,—things that have a mere jural existence, such as an inheritance, a usufruct, obligations, in whatsoever way contracted. Nor does it affect our definition *that there are corporeals included in an inheritance*; for the fruits gathered from the soil [by a usufructuary] are also corporeal, and what is due to us under an obligation is generally corporeal, as, for example, land, a slave, money: it is the right of succession, the right of usufructing, and the right under the obligation that is incorporeal. To the same class belong those rights over urban and rural estates *which go by*  
 14a *the name of servitudes. Urban servitudes are such as these: the right of building higher and thus obstructing a neighbour's*

§§ 12-14. Comp. tit. I. *DE REBUS INCORPORALIBUS* (ii, 2), from which the words supplied in § 14 are derived. See also Gai. fr. 1, § 1, D. *de diu. rer.* (i, 8). Comp. Cic. *Top.* v, §§ 26, 27.

§§ 14a-15a. These pars. are on p. 57 of the ms., the greater part of which is illegible.

§ 14a. Comp. pr. §§ 1, 2, tit. I. *DE SERVITUTIBUS* (ii, 3). The beginning of the par. may have run thus: *Urbanorum praediorum iura sunt altius tollendi et eo modo officiendi luminibus vicini aedium, aut non, etc.;* see Gai. in fr. 2, 6, D. *de seruit. praed. urb.* (viii, 2). The next five

lines give us nothing decipherable, except the words *ius aquae ducendae*; whence it may be concluded that they contained a partial enumeration of the rural as well as the urban *seruitutes praediorum*. The Epit. ii, 2, § 3, enumerates them thus: *Praediorum urbanorum iura sunt stillicidia, fenestrae, cloacae, altius erigendae domus aut non erigendae, et luminum, ut ita quis fabricet ut vicinae domui lumen non tollat. Praediorum uero rusticorum iura sunt uia uel iter, per quod pecus aut animalia debeant ambulare uel ad aquam duci, et aquae-ductus.*

*extollendi ne luminibus vicini officiatur: item fluminum et stillicidiorum ius, — — — — —.*

15 *Res — — — — nec Mancipi. Mancipi sunt — — — — —; item aedes in italico solo<sup>1</sup> — — — — — — — praediorum urbanorum nec Mancipi (habentur). item*

15a *stipendiaria praedia et tributaria nec Mancipi sunt. Sed quod diximus — — — — Mancipi esse — — — — — statim ut nata sunt Mancipi esse putant; Nerva uero et Proculus et ceteri diuersae scholae auctores<sup>1</sup> non aliter ea Mancipi esse putant quam si domita sunt; et si propter nimiam feritatem domari non possunt, tunc uideri Mancipi esse incipere cum ad eam aetatem peruenerint qua domari*

lights, and his right to prevent us building higher lest thereby his light should be obstructed; the rights of roof-gutter and rain-drop, [and others. Among rural servitudes are rights of way and passage for men or animals, and right of aqueduct.]

15 Further, things are either Mancipi or nec Mancipi. Mancipi are lands and houses in places of italic right, [slaves, and animals domesticated by yoke or saddle. Rural praedial servitudes likewise are Mancipi; but those over] urban estates are regarded as nec Mancipi. Stipendiary and tributary pro-

15a vincial lands are also nec Mancipi. The statement that [animals we are wont to tame are Mancipi is variously understood; for while the authorities of our school are of opinion that such animals—oxen, mules, horses, and asses]—are res Mancipi from the moment of birth, Nerva and Proculus, and the leaders of the other school, hold that they become so only when tamed, or, if this be impossible because of their unusual ferocity, when they attain the age at which such animals are

§ 15. The next seven or eight lines, for the most part undecipherable, seem to have contained a reference to the distinction between *res Mancipi* and *nec Mancipi* (i, 120, note 1), and an enumeration of the former. It might be reconstructed thus: *Res autem uel Mancipi sunt uel nec Mancipi. Mancipi sunt praedia rustica in italico solo; item aedes in italico solo; item serui, et animalia mansueta quae collo dorsoue domantur. seruitutes quoque praediorum rusticorum Mancipi sunt; sed seruitutes praediorum urbanorum nec Mancipi habentur. item stipendiaria*

*praedia et tributaria nec Mancipi sunt. Comp. i, §§ 120, 121; ii, §§ 17, 21, 29; Vlp. xix, §§ 1, f.*

<sup>1</sup> As regards *praedia in italico solo*, see i, 120, note 2.

§ 15a. The last three lines of p. 57 are almost illegible. They must have run to the following effect: *Sed quod diximus ea animalia quae domari solent Mancipi esse uarie accipitur. Nostri quidem praeceptores haec animalia, qualia sunt boues muli equi asini, statim, etc. Comp. Isidor. Orig. ix, 4, § 45 (Bruns, p. 303).*

<sup>1</sup> See i, 196, note 1.



- 16 solent. (*Sed*) ferae bestiae nec Mancipi sunt, uelut ursi, leones; item ea animalia quae fere bestiarum numero sunt, uelut elephanti et cameli; et ideo ad rem non pertinet quod haec animalia etiam collo dorsoue domari *solent*; nam nec [notitia]<sup>1</sup> quidem eorum animalium illo tempore fuit quo *constituebatur* quasdam res Mancipi esse, quasdam non
- 17 Mancipi. Item fere omnia quae incorporalia sunt nec Mancipi sunt, exceptis seruitutibus praediorum rusticorum; nam eas Mancipi esse constat, quamuis sint ex numero rerum incorporalium.
- 18 Magna autem differentia est inter Mancipi res et nec
- 19 Mancipi. nam res nec Mancipi ipsa traditione pleno iure alterius fiunt, si modo corporales sunt et ob id recipiunt
- 20 traditionem. itaque si tibi uestem uel aurum uel argentum tradidero, siue ex uenditionis causa siue ex donationis siue quauis alia ex causa, statim tua fit ea res, si modo *ego eius*
- 21 *dominus sim iure ciuili*.<sup>1</sup> In eadem causa sunt prouincialia praedia, quorum alia stipendiaria alia tributaria uocamus.

- 
- 16 generally broken in. But wild beasts, such as bears and lions, are *nec Mancipi*; so are such semi-wild beasts as elephants and camels. Nor does it matter that those last are often broken in as draught or carrying animals; for none of them were even known at the time when it was settled what things
- 17 should be *Mancipi* and what *nec Mancipi*. Almost all incorporeals are *nec Mancipi*, except rural praedial servitudes; for these are held to be *res Mancipi*, though incorporeal.
- 18 There is an important difference between *res Mancipi* and
- 19 *res nec Mancipi*. For what are *nec Mancipi* pass to another in full ownership by simple delivery, provided they are cor-
- 20 poreal and thus deliverable. Therefore, if I have delivered to you a garment, or gold, or silver, whether in pursuance of a sale, or as a donation, or upon any other sufficient cause, it straightway becomes yours, provided always that I who
- 21 deliver it am in law its owner. In exactly the same position are provincial lands, some of which we call stipendiary,

§ 16. Comp. Vlp. xix, 1.

<sup>1</sup> So Hu.; K. u. S. have *nam [ne] nomen quidem eorum animalium illo tempore [notum] fuit*.

§ 17. Comp. i, 120, and notes; ii, §§ 15, 29; Vlp. xix, 1.

§§ 18-20. Comp. Vlp. xix, 7; Fr. Vat. § 313; Boeth. in Cic. Top. v, 5,

§ 28 (ed. Bait. p. 321); Th. ii, 1, § 40.

§ 19. See § 40, note.

§ 20. <sup>1</sup> So P. renders the *io* or *ic* of ms., disregarded by K. u. S., and placed by Hu. at the beginning of next par.

§ 21. Comp. i, 6; ii, 7; § 40, I. de rer. diu., ii, 1; Th. ii, 1, § 40.

- stipendiaria sunt ea quae in his prouinciis sunt quae propriae populi Romani esse intelleguntur; tributaria sunt ea quae in his prouinciis sunt quae propriae Caesaris esse creduntur.
- 22 Mancipi uero res sunt quae per mancipationem ad alium transferuntur; unde etiam mancipi res sunt dictae. quod
- 23 autem ualet mancipatio [*idem ualet et in iure cessio*. Et [*mancipatio*] quidem quemadmodum fiat superiore commentario
- 24 tradidimus. In iure cessio autem hoc modo fit: apud magistratum populi Romani, ueluti praetorem, [uel apud praesidem prouinciae],<sup>1</sup> is cui res in iure ceditur rem tenens ita dicit: HVNC EGO HOMINEM<sup>2</sup> EX IVRE QVIRITIVM MEVM ESSE AIO; deinde, postquam hic uindicauerit, (*praetor interrogat*)<sup>3</sup> eum qui cedit an contra uindicet; quo negante aut tacente tunc ei qui uindicauerit eam rem addicit; idque legis actio uocatur. hoc fieri potest etiam in prouinciis apud praesides earum.

- and others tributary. Stipendiary lands are those situated in provinces regarded as specially belonging to the Roman people; tributary those lying in provinces held to belong
- 22 specially to the emperor. But those things are *res mancipi* that are transferred by mancipation; hence their name. [*Equally effectual with it is in iure cessio, i.e. cession in court.*]
- 23 How mancipation is effected has been explained in the preceding Commentary. Cession in court proceeds thus: in
- 24 the presence of one of the Roman magistrates, a praetor say, he to whom the thing in question is being ceded, having hold of it, says—‘I say that this slave is mine in quiritarian right;’ when he has thus vindicated, the praetor asks the cedent whether he makes any counter-vindication; on the latter replying in the negative or remaining silent, the praetor adjudges the thing to the vindicant. The procedure is spoken of as a *legis actio*; and it may be employed even in a province,

§§ 22, 23. The words in ital. in these pars., suggested by G., are adopted by most eds. P. proposes: *quae priuatim fieri potest, idem ualet utique in iure cessio*.

§ 22. Comp. i, 121; Vlp. xix, 3; Varro de R. R. ii, 10, § 4 (Bruns, p. 283); Boeth. in Cic. Top. v, 5, § 28 (ed. Bait. 322).

§ 23. Comp. i, 119.

§ 24. Comp. i, 134; ii, 96; iv, 16; Vlp. xix, §§ 9, 10; Boeth. in Cic. Top. v, 5, § 28 (ed. Bait. p. 322);

Isidor. Orig. v, 25, § 32 (Bruns, p. 302).

<sup>1</sup> These words are manifestly a gloss, as the statement occurs more directly in the end of the paragraph.

<sup>2</sup> In illustrative styles or *formulae* of transactions referring to moveables, a slave is usually made the object.

<sup>3</sup> The words *praetor interrogat* are from Boeth., who is professedly quoting from Gai.

- 25 *Plerumque tamen* et fere semper mancipationibus utimur: quod enim ipsi per nos praesentibus amicis agere possumus, hoc non est necesse cum maiore difficultate apud praetorem  
 26 aut apud praesidem prouinciae *agere*. *Quod si* neque mancipata neque in iure cessa sit *res Mancipi*, — — — —  
 27 — —. [27] — — — — — — — —.  
 28 (*Res*) incorporales traditionem non recipere manifestum est.  
 29 Sed iura praediorum urbanorum in iure cedi possunt; rusticorum uero etiam mancipari possunt.  
 30 *Vsusufructus* in iure cessionem tantum recipit: nam dominus proprietatis alii *usufructum* in iure cedere potest, ut ille *usufructum* habeat et ipse nudam proprietatem (*retineat*). ipse usufructuarius in iure cedendo domino proprietatis *usu-*

- 25 before the governor. Usually, however, indeed almost always, we make use of mancipation; for as we can carry out the latter ourselves in the presence of a few friends, it is unnecessary to have recourse to the more troublesome procedure  
 26 before a praetor or provincial governor. If a *res Mancipi* have been neither mancipated nor ceded in court, — — — —  
 27 — — —. [27] — — — — — — — —.  
 28 It is manifest that incorporeals are incapable of transfer by  
 29 delivery. But urban praedial rights may be ceded in court, and rural ones may also be mancipated.  
 30 A usufruct can be transferred only by *cessio in iure*; for an owner can cede the usufruct of what belongs to him to another, so that the cessionary shall have the usufructuary right, he himself retaining the bare property. The effect of cession of the right of usufruct by the usufructuary to the owner of the property is that it thereby passes from the cedent and merges

§ 26. The initial words of this par. are on the last line of p. 59; of p. 60 not above a dozen words are decipherable. The par. possibly contained a statement of the consequences of neglect of mancipation or cession in court in conveyance of a *res Mancipi*; although this matter is afterwards referred to in § 41.

§ 27. This par. is assumed to have included the latter half of p. 60 and first twelve lines of p. 61. These last are partially legible, though no line completely so. It is not improbable that they contained some explana-

tion of the *ius commercii*, as in Vlp. xix, §§ 4, 5; and the words extant on p. 61 show that it also included some reference to the qualities of land in the provinces, according as it did or did not enjoy the privileges of the *ius italicum* (upon which see i, 120, note 2).

§ 28. Comp. § 19; Gai. in fr. 43, § 1, D. *de adq. rer. dom.* (xli, 1).

§ 29. Comp. § 17.

§§ 30-33. Comp. tit. I. *DE VSUFRVCTV*, (ii, 4).

§ 30. Comp. § 33; Vlp. xix, 11; Paul. iii, 6, § 32; Fr. Vat. § 45; § 3, tit. I. afd.

- fructum *efficit ut a se discedat et conuertatur in proprietatem* : alii uero in iure cedendo nihilo minus ius suum retinet;
- 31 creditur enim ea cessione nihil agi. Sed haec scilicet in italicis praediis<sup>1</sup> ita sunt, quia et ipsa praedia mancipationem et in iure cessionem recipiunt. alioquin in prouincialibus praediis, siue quis usumfructum siue ius eundi agendi aquamue ducendi, uel altius tollendi aedes aut non tollendi ne luminibus uicini officiat,<sup>2</sup> ceteraque similia iura constituere uelit, pactionibus et stipulationibus<sup>3</sup> id efficere potest; quia ne ipsa quidem praedia mancipationem aut in iure cessionem recipiunt.
- 32 *Sed* cum ususfructus et hominum et ceterorum animalium constitui possit, intellegere debemus horum usumfructum etiam in prouinciis per in iure cessionem constitui posse.
- 33 Quod autem diximus usumfructum in iure cessionem tantum recipere non est temere dictum, quamuis etiam per mancipa-

- 
- again in the property; by cession in court to a third party, however, the usufructuary still retains his right,—the cession
- 31 is held in that case to be resultless. But this applies only to a usufruct of lands that have italic privilege; for they are susceptible both of mancipation and cession in court. In the case of [unprivileged] provincial lands, if a man desire to constitute a usufruct, or a right of footpath or cattle road, of aqueduct, of higher-building or preventing higher-building lest a neighbour's lights should be interfered with, or any similar description of servitude, he must carry out his object by means of pacts and stipulations; for lands such as these are not themselves susceptible of mancipation or cession in
- 32 court. But there may be usufruct both of slaves and animals; and it should be understood that such a servitude may be constituted by *in iure cessio* even in the provinces.
- 33 Our statement that a usufruct can be transferred only by cession in court is not made inconsiderately; for although it is true that it may be constituted by mancipation in this

§ 31. Comp. Gai. in fr. 3, pr. D. *de usufr.* (vii, 1); § 1, tit. I. *afid.*; § 4, I. *de seruitut.* (ii, 3).

<sup>1</sup> See i, 120, note 2.

<sup>2</sup> There is here, as in § 14*a*, a little confusion of the easement and the burden. *Seruitus* was used to express either; but properly it was the burden, *ius seruitutis* being the easement.

<sup>3</sup> The *pactio* was the agreement to constitute; the *stipulatio* a subsequent engagement (under a penalty) by the owner of the servient tenement not to interfere with the exercise of the right by the owner of the dominant one. See fr. 2, § 5, fr. 4, § 1, fr. 38, §§ 10, f., D. *de V. O.* (xlv, 1).

§ 33. Comp. § 30; Fr. Vat. §§ 47, 50.



tionem constitui possit eo quod in mancipanda proprietate detrahi potest; non enim ipse usufructus mancipatur, sed cum in mancipanda proprietate deducatur, eo fit ut apud alium usufructus apud alium proprietas sit.

- 34 Hereditas quoque in iure cessionem tantum recipit.  
 35 Nam si is ad quem ab intestato legitimo iure pertinet hereditas, in iure eam alii ante aditionem cedat, id est antequam heres extiterit, proinde fit heres is cui in iure cesserit, ac si ipse per legem ad hereditatem uocatus esset; post obligationem uero si cesserit nihilo minus ipse heres permanet et ob id creditoribus tenebitur, debita uero pereunt eoque modo debitores hereditarii lucrum faciunt; corpora uero eius hereditatis perinde transeunt ad eum cui cessa est hereditas,  
 36 ac si ei singula in iure cessa fuissent. Testamento autem scriptus heres ante aditam quidem hereditatem in iure cedendo eam alii nihil agit; postea uero quam adierit si cedat, ea accidunt quae proxime diximus de eo ad quem ab intestato legitimo iure pertinet hereditas, si post obligationem in iure

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sense—that an owner reserves it in mancipating his property, here it is not the usufruct that is mancipated, but in the mancipation of the property the usufruct is reserved, and thus it comes to pass that the usufruct is in one person while the property is in another.

- 34 An inheritance also is not otherwise transferable than by  
 35 cession in court. For if he who on intestacy is entitled to an inheritance as heir-at-law cede it in court to another person before entry, that is, before he has assumed the position of heir, the cessionary becomes heir just as if the inheritance had devolved upon him by operation of law. If, however, the cession be after the heir-at-law has accepted the responsibilities of his position, he nevertheless still remains heir and responsible to the deceased's creditors, while debts due to the inheritance are extinguished, and the deceased's debtors by so much the gainers; but the corporeal items of the inheritance pass to the cessionary just as if they had each been ceded to  
 36 him separately. Cession of an inheritance by the testamentary heir before entry is of no avail; if, however, he cede after entry, the same results follow that we have described in speaking of cession by an heir-at-law *ab intestato* after assump-

§ 34. Before this par. a line and a half  
 vacant in the ms. Comp. Vlp. xix, 11.

§§ 35, 36. Comp. iii, §§ 85, 86; Vlp.  
 xix, §§ 12-15.

37 cedat. Idem et de necessariis heredibus diuersae scholae auctores<sup>1</sup> existimant, quod nihil uidetur interesse utrum [*aliquis*] adeundo hereditatem<sup>2</sup> fiat heres an inuitus existat; quod quale sit suo loco<sup>3</sup> apparebit: sed nostri praeceptores putant nihil agere necessarium heredem cum in iure cedat hereditatem.

38 Obligationes quoquo modo contractae nihil eorum recipiunt: nam quod mihi ab aliquo debetur, id si uelim tibi deberi, nullo eorum modo quibus res corporales ad alium transferuntur id efficere possum: sed opus est ut iubente me tu ab eo stipuleris; quae res efficit ut a me liberetur et incipiat tibi  
39 teneri. quae dicitur nouatio obligationis. sine hac uero nouatione non poteris tuo nomine agere, sed debes ex persona mea quasi cognitor aut procurator meus experiri.

40 Sequitur ut admoneamus apud peregrinos quidem unum esse

37 tion of the heir's responsibilities. The authorities of the other school think that cession by a necessary heir also produces those same results, it being in their opinion immaterial whether a man becomes heir by his own act of entry or has that character imposed upon him against his will,—the distinction will be explained in the proper place; our school, on the other hand, holds that cession of an inheritance by a necessary heir is altogether inoperative.

38 There is nothing of this sort in obligations, howsoever contracted; for by none of those modes whereby corporeals are transferred can I bring it about that what a man owes me, he shall in future, if I wish it, owe to you. What must be done is this: you must yourself, on my instruction, take from him a stipulatory engagement [for the same debt]; thereby he is discharged so far as I am concerned, but begins to be bound  
39 to you. This is called novation of an obligation. Without such novation you cannot proceed against him in your own name, but must sue in mine as my cognitor or procurator.

40 We have next to observe that among peregrins there is but

§ 37. Comp. iii, 87.

<sup>1</sup> See i, 196, note 1.

<sup>2</sup> The ms. has *hereditatemstatem*; which has led P. to interject *statim*, not, however, before *fiat*, but before *existat*.

<sup>3</sup> See §§ 152, f.

§ 38. Comp. iii, 176.

§ 39. Comp. iv, §§ 82, 86.

§§ 40-61. Comp. tit. I. *DE VSVCAPIONI*.

*BVS ET LONGI TEMPORIS POSSESSIO-NIBVS* (ii, 6).

§ 40. Comp. i, §§ 54 (and note), 167; ii, 88; iii, 166; Th. i, 5, § 4. The latter passage runs (vers. Reitz.): *Est igitur, ut dixi, naturale dominium* (φυσικὴ διαπορσία) *et legitimum dominium* (ἐνομὸς διαπορσία). *Ac naturale dicitur in bonis, et dominus bonitarius: legitimum dicitur iure*

- dominium: nam aut dominus quisque est aut dominus non intellegitur. Quo iure etiam populus Romanus olim utebatur: aut enim ex iure Quiritium unusquisque dominus erat, aut non intellegebatur dominus. sed postea diuisionem accepit dominium, ut alius possit esse ex iure Quiritium dominus,
- 41 alius in bonis habere. nam si tibi rem Mancipi neque Mancipauero neque in iure cessero sed tantum tradidero, in bonis quidem tuis ea res efficitur, ex iure Quiritium uero mea permanebit donec tu eam possidendo usucapias: semel enim inpleta usucapione proinde pleno iure incipit, id est et in bonis et ex iure Quiritium,<sup>1</sup> tua res esse, ac si ea Mancipata
- 42 uel in iure cessa [esset. *Vsucapio autem*] mobilium quidem rerum anno completur, fundi uero et aedium biennio; et ita lege XII tabularum cautum est.

- 
- one sort of ownership; for a man either is owner or is not. And so it was of old time with the people of Rome; a man was either owner according to the law of the Quiritians, or he was not held to be owner at all. But afterwards property underwent this distinction,—that while one man may be owner of a thing in quiritary right, another may have it *in*
- 41 *bonis*. Thus, suppose I have neither Mancipated a *res Mancipi*, nor conveyed it to you by cession in court, but have simply delivered it, while you will thereby have it *in bonis*, it will still remain mine in quiritary right until you have usucapted it by possession; for the moment your usucapion of it is completed it forthwith begins to be yours in plenary ownership, *i.e.* both in bonitarian and in quiritarian right, exactly as if it had been Mancipated to you or ceded to you
- 42 in court. The usucapion of moveables is completed in one year, that of lands and houses in two; so it is provided in the Twelve Tables.

*Quiritium, id est Romanorum. . . .*  
*. . . Sed si quis utrumque habebat dominium, dicebatur pleno iure* (τελείῳ δικαίῳ) *dominus, utpote ambo habens, legitimum et naturale.* The distinction was abolished by Just., l. un. C. de nudo iure Quir. toll. (v, 25).

- § 41. Comp. § 204; iii. 80; Vlp. i, 16; Boeth. in Cic. Top. iii, 5, § 28 (ed. Bait. p. 322).

<sup>1</sup> The words *id est . . . . Quiritium* are omitted by P. as a gloss.

- § 42. The initial words, supplied by L., are accepted by most eds. Comp. Cic. Top. iv, 23; pro Caec. xix, 54;

Schoell, *Tab.* vi, 3; Gai. ii, 204; Vlp. xix, 8; pr. tit. I. affd.; Th. ii, 6, pr. P. altogether rejects the par., as not only a gloss, but an erroneous one; seeing it contradicts the repeated statement of Cic. that houses were not mentioned in the provision of the XII Tab. as to usucapion, but the rule as to lands analogically extended to them by the early jurists, or rather by the pontiffs, in whose hands (Pomp. in fr. 2, § 6, D. de O. I. i, 2) was the interpretation (*interpretandi scientia*) of the XII Tables.

- 43 Ceterum etiam earum rerum usucapio nobis conpetit quae non a domino nobis traditae fuerint, siue mancipi sint eae res siue nec mancipi, si modo eas bona fide acceperimus, cum  
 44 crederemus eum qui traderet dominum esse. quod ideo receptum uidetur ne rerum dominia diutius in incerto essent, cum sufficeret domino ad inquirendam rem suam anni aut bienii spatium, quod tempus ad usucapionem possessori tributum est.
- 45 Sed aliquando etiamsi maxime quis bona fide alienam rem possideat, non tamen illi usucapio procedit, uelut si quis rem furtiuam aut ui possessam possideat; nam furtiuam lex XII tabularum<sup>1</sup> usucapi prohibet, ui possessam lex Iulia et Plautia.<sup>2</sup>
- 46 Item prouincialia praedia usucapionem non recipiunt.
- 47 [*Item olim*]<sup>1</sup> mulieris quae in agnatorum tutela erat res

- 43 We may also acquire by usucapion things, whether *mancipi* or *nec mancipi*, that have been conveyed to us by one not their owner, provided we have accepted them in good faith, believing that the party conveying them was in truth their  
 44 owner. This rule seems to have been received in order to prevent a too prolonged uncertainty as to a question of ownership; one or two years—the time allowed to a possessor for usucapion—being thought ample for an owner making inquiries after a thing belonging to him.
- 45 But sometimes, even though a man possess in the best of faith, there can be no usucapion in his favour, as when what he possesses has been stolen or acquired by a previous holder by force; for the Twelve Tables prohibit the usucapion of stolen goods, and the Julian and Plautian law that of things  
 46 violently taken possession of. Further, provincial lands  
 47 are not susceptible of usucapion. *Formerly also* the *res mancipi* of a woman in tutelage of her agnates could not be

§§ 43-64. These pars. postponed by P. —as appears to me without any justification—to §§ 65-79.

§§ 43, 44. Comp. Gal. in fr. 1, D. *de usurp.* (xli, 3); Vlp. xix, 8; pr. tit. I. afd.

§ 45. Comp. §§ 1, 2, tit. I. afd.

<sup>1</sup> See Schoell, *Tab.* viii, 17. A similar provision as to *res furtivae* was contained in a *lex Atinia* of 557 | 197 (?); comp. Gell. xvii, 7, § 1; § 2, tit. I. afd.

<sup>2</sup> From Th. ii, 6, § 2, it appears that these were two distinct laws; probably the *lex Plautia de ui*, men-

tioned by Cic. *pro Mil.* xiii, 35, and the *lex Iulia de ui*, which forms the subject of tit. D. xlviii, 7, but whose history is somewhat obscure.

§ 46. Comp. §§ 7, 21; pr. tit. I. afd.; I. un. C. *de usucap. transf.* (vii, 31).

§ 47. Comp. i, 192; Cic. *ad Att.* i, 5, § 6; Schoell, *Tab.* v, 2.

<sup>1</sup> G. and most eds. interject these two words; but this necessitates the rejection of *res*, which stands before *mulieris* in the ms. P. manages to retain it by thus supplying the deficiency in the text: [*item ante legem* [*Claudiam, si erant*] *res mulieris*, etc.



mancipi usucapi non poterant, praeterquam si ab ipsa *auctore* tutore traditae essent: id ita lege XII tabularum *manifestatur*.<sup>2</sup>

- 48 Item liberos homines et res sacras et religiosas usucapi non  
49 posse manifestum est. Quod ergo uulgo dicitur furtiuarum rerum et ui possessarum usucapionem per legem XII tabularum prohibitam esse, non eo pertinet ut (*ne ipse*) fur (*quiue* (*per*) uim (*possidet*) usucapere possit, (nam huic alia ratione usucapio non competit, quia scilicet mala fide possidet); sed nec ullus alius, quamquam ab eo bona fide emerit, usucapi-  
50 endi ius habeat. Vnde in rebus mobilibus non facile (*procedit ut bonae fidei possessori usucapio*) conpetat, quia qui alienam rem uendidit et tradidit furtum committit; idemque accidit etiam si ex alia causa tradatur. sed tamen hoc aliquando aliter se habet; nam si heres rem defuncto commodatam aut locatam uel apud eum depositam, existimans eam esse hereditariam, uendiderit aut donauerit, furtum non committit;<sup>1</sup> item si is ad quem ancillae ususfructus pertinet,

- usucapted unless they had been delivered with her tutor's  
48 *auctoritas*; this is clearly shown in the Twelve Tables. And it is also manifest that free persons and things sacred and  
49 religious cannot be usucapted. The common saying that by the law of the Twelve Tables usucapion is prohibited of things stolen or forcibly taken possession of does not mean that the actual thief, or person taking possession by force, cannot usucapt,—his usucapion is impossible for a different reason, namely, that he possesses in bad faith,—but that no other person has the right of usucapting them, even though he may have purchased them in good faith from the *malae*  
50 *fidei* possessor. As regards moveables, therefore, *usucapion is hardly possible for a bonae fidei possessor*, seeing that he who sells and delivers what belongs to another commits a theft; and so it is if the delivery be on some other ground. Sometimes, however, it is otherwise; for if an heir sell or make a present of a thing that has been lent or located to or deposited with the deceased, under the impression that it belongs to the inheritance, he does not steal it; neither does the usufructuary of a slave woman who sells or makes a gift of a

<sup>2</sup> So M. (K. u. S., footnote); the ms. has *mf.*; most eds. substitute *cautum est* or *cautum erat*.

§ 48. Comp. § 1, tit. I. afl.

§ 49. § 3, tit. I. afl., from which the words in ital., illegible in the ms., are supplied. See also § 45.

§ 50. Down to *tradatur* the par. corresponds to § 3, tit. I. afl., from which the words in ital. are supplied.

<sup>1</sup> § 4, tit. I. afl. Comp. Gai. in fr. 36, pr. D. *de usurp.* (xli, 3).

- partum etiam suum esse credens uendiderit aut donauerit, furtum non committit; furtum enim sine adfectu furandi non committitur.<sup>2</sup> aliis quoque modis accidere potest ut quis sine uitio furti rem alienam ad aliquem transferat et efficiat ut a
- 51 possessore usucapiatur.<sup>3</sup> Fundi quoque alieni potest aliquis *sine ui* possessionem nancisci, quae uel ex negligentia domini uacet uel quia dominus sine successore decesserit uel longo tempore afuerit: quam si ad alium bona fide accipientem transtulerit, poterit usucapere possessor; et quamuis ipse qui uacantem possessionem nactus est intellegat alienum esse fundum, — — — — —<sup>1</sup> ad usucapionem nocetur, [*cum*] inprobata sit eorum sententia qui putauerint *furtiuum* fundum<sup>2</sup> fieri posse.
- 52 Rursus ex contrario accidit ut qui sciat alienam rem se possidere usucapiat, ueluti si rem hereditariam cuius posses-

- child to which she has given birth, under the belief that it is his; for there can be no theft without intent to steal. And there are yet other ways in which it may happen that a man transfers to another, without any taint of theft, what belongs to a third party, and thus puts the possessor in a position to
- 51 usucapt it. It is quite possible also for a man to take possession without any violence of land that is not his, if it be unoccupied either through the negligence of the owner, or because he has died leaving no successor, or has for a long time been absent; and if the party who has thus obtained possession transfer it to another who takes it in good faith, the latter may usucapt; for the knowledge of the appropriator of the vacant possession that the land in question belongs to a third party [*will not impede the usucapion of the bonae fidei [possessor]*], the opinion of those who used to think that land may bear the taint of theft being now universally condemned.
- 52 On the other hand, it [sometimes] happens that a person may usucapt who takes possession of what he well knows to

<sup>2</sup> § 5, tit. I. afd. Comp. Gai. in fr. 36, § 1, fr. 37, pr. D. *de usurp.* (xli, 3).

<sup>3</sup> § 6, tit. I. afd.

§ 51. Comp. Gai. in fr. 37, § 1, fr. 38, D. *de usurp.* (xli, 3); § 7, tit. I. afd.

<sup>1</sup> Nearly a line illegible, with exception of *nihilomm*. Gou. proposes: *tamen nihilo magis bonae fidei possessori*, etc.; while for *nihilo*

*magis* K. u. S. and Hu. read *nihil hoc*.

<sup>2</sup> Comp. Gell. xi, 18, §§ 12, 13.

§ 52. Comp. iii, 201. There seems good reason for believing that *bona fides* was not originally a condition of usucapion; consequently the usucapions mentioned in §§ 52-61 were merely varieties in which, for special reasons, the original doctrine was not departed from.

sionem heres nondum nactus est aliquis possederit; nam ei concessum [*est usu*]capere, si modo ea res est quae recipit usucapionem: quae species possessionis et usucapionis pro  
 53 herede uocatur. Et in tantum haec usucapio concessa est  
 54 ut et res quae solo continentur anno usucapiantur. quare autem hoc casu<sup>1</sup> etiam soli rerum annua constituta sit usucapio illa ratio est, quod olim rerum hereditariarum possessione<sup>2</sup> ipsae hereditates usucapi credebantur, [scilicet anno]:<sup>3</sup> lex enim XII tabularum soli quidem res biennio usucapi iussit, ceteras uero anno;<sup>4</sup> ergo hereditas in ceteris rebus uidebatur esse, quia soli non est quia neque corporalis est: et quamuis postea creditum sit ipsas hereditates usucapi non posse, tamen in omnibus rebus hereditariis, etiam quae solo tenentur, annua  
 55 usucapio remansit. Quare autem omnino tam inproba

belong to another, as for instance when he appropriates something belonging to an inheritance, but which the heir has not yet reduced into possession; in such a case he is allowed to usucapt, provided the thing in question be susceptible of usucapion. This variety of possession and usucapion is said  
 53 to be *pro herede*, [*i.e.* in the character of heir.] And to such an extent has this usucapion been conceded, that even  
 54 immoveables may thus be usucaptured in a year. The reason why in this case a one year's usucapion of immoveables was introduced is this—that formerly by possession of the constituent items of an inheritance the inheritance itself was believed to be usucaptured, and that in a year. (For the provision of the Twelve Tables was that immoveables were to be usucaptured in two years, but other things in one; and an inheritance seemed to be included amongst the 'other things,' for it is not immoveable, because not even corporeal.) And, although afterwards it came to be admitted that an inheritance as such was not susceptible of usucapion, still the one year's usucapion continued to be applied to every item of the  
 55 hereditary estate, even though immoveable. That such an iniquitous possession and usucapion should ever have been

§§ 53, 54. Comp. Cic. *ad Att.* i, 5, § 6; Sen. *de benef.* vi, 5.

§ 54. <sup>1</sup> The ms. has *etiam hoc casu*.

<sup>2</sup> For *possessiones ut*, which stands in the ms., G., Bk., Hu., and K. u. S. read *possessione uelut*; P. *possessione*, [*eae*], *sicut*. *Possessiones usucapi* is certainly an unusual phrase, though there is something very like it in the

*possessionem usurecipi* of § 61. I am disposed, however, to delete both the final *s* and the *ut*, and to read this simply *possessione*.

<sup>3</sup> These words seem to be a gloss.

<sup>4</sup> See § 42.

§ 55. Comp. Cic. *de legib.* ii, 19, §§ 48, 49; 20, §§ 50, 51; Fest. v. *Sine sacris hereditas* (Bruns, p. 267).

possessio et usucapio concessa sit illa ratio est, quod uoluerunt ueteres maturius hereditates adiri, ut essent qui sacra facerent, quorum illis temporibus summa observatio fuit, et ut creditores haberent a quo suum consequerentur. Haec autem species possessionis et usucapionis etiam lucratiua uocatur: nam sciens quisque rem alienam lucrifacit. sed hoc tempore iam non est lucratiua: nam ex auctoritate Hadriani senatusconsultum factum est ut tales usucapiones reuocarentur; et ideo potest heres ab eo qui rem usucepit hereditatem petendo perinde eam rem consequi atque si usucapta non esset. necessario tamen herede<sup>1</sup> extante nihil ipso iure pro herede usucapi potest.

Adhuc etiam ex aliis causis sciens quisque rem alienam

recognized may be accounted for by the anxiety of our ancestors to accelerate entry to an inheritance, in order that there might be some one to attend to the sacred rites [of the family], on which great store was set in those days, and that the creditors [of the deceased] might have some one from whom they could recover what was due to them. This sort of possession and usucapion is also sometimes called *usucapio lucratiua*; because the possessor knowingly enriches himself with what belongs to another. But at the present day it is no longer lucrative; for, by a senatusconsult enacted by authority of the emperor Hadrian, such usucapions may be revoked, and the heir recover from the usucaptor by *hereditatis petitio* as if there never had been any usucapion. If a necessary heir exist, however, nothing can be *ipso iure* usucaptured *pro herede*.

There are yet other cases in which a man may usucapt

§ 56. Comp. fr. 71, D. *de furt.* (xlvii, 2); fr. 33, § 1, D. *de usurp.* (xli, 3).

§ 57. By Marc. Aurel. it was made an offence, under the name of *crimen expilatae hereditatis*, for a person, not pretending a title, to take possession of an inheritance either before or after the heir's entry; see tit. D. *expil. hered.* (xlvii, 19).

§ 58. Comp. iii, 201. It is remarkable that, prior to Studemund's revision of the text, all eds. made both these two pars. affirm the reverse of the truth.

<sup>1</sup> See the meaning of *necessarius heres* in § 153. Hu. reads [*suo*] *et necessario tamen herede*; on the ground that the ms. has *et* before

*necessario*, and that it can be explained only on the supposition that *suo* has been omitted. (Who were *sui et necessarii*, see described in § 156. The difference in position of the two classes is well explained by Vlp. xxii, 24.) But as, in iii, 201, Gai. again uses simply the word *necessarii*, I do not think Huschke's emendation can be accepted.

§ 59. Comp. iii, 201. The thing conveyed *fiduciae causa* was itself spoken of as a *fiducia*; as such, even though it might be a *res soli*, it came under the category of 'other things' (§ 54), and so could be usucaptured in a year.



- usucapit: nam qui rem alicui fiduciae causa mancipio dederit uel in iure cesserit, si eandem ipse possederit, potest usucapere, anno scilicet, [*etiam*] soli si sit. quae species usucapionis dicitur usureceptio, quia id quod aliquando habuimus
- 60 recipimus per usucapionem. Sed cum fiducia contrahitur aut cum creditore pignoris iure, aut cum amico quo tutius nostrae res apud eum essent, si quidem cum amico contracta sit fiducia sane omni modo competit usureceptio; si uero cum creditore, soluta quidem pecunia omni modo competit, nondum uero soluta ita demum competit si neque conduxerit eam rem a creditore debitor, neque precario rogauerit ut eam rem possidere liceret; quo casu lucratiua usucapio competit.
- 61 Item si rem obligatam sibi populus uendiderit, eamque dominus possederit, concessa est usureceptio: sed hoc casu praedium biennio usurecipitur: et hoc est quod uulgo dicitur

- what he knows to belong to another. Thus, if an individual have taken possession of a thing which he had previously mancipated or ceded in court to another for a fiduciary purpose, he may usucapt in a year, even though the thing in question be immoveable. This sort of usucapion is called usureception; because we recover by usucapion what was
- 60 once our own. Such a fiduciary conveyance may be either to a creditor by way of real security, or to a friend in whose hands we think our property will be safer than in our own. In the latter case usureception on our part is competent under any circumstances. In the former it is always competent after we have paid our debt; but before payment it is competent only if we have neither taken the thing from our creditor in location, nor on our own request obtained possession of it from him during his pleasure; in the absence of either of those obstacles there may be a lucrative usucapion.
- 61 Then again, if a man have taken possession of lands of his that have been mortgaged to the state, and that have been sold by its officials, usureception is competent, but only in

§ 60. Comp. Boeth. in *Cic. Top.* iv, 10, § 41 (Bruns, p. 295); Isidor. *Orig.* v, 25, § 23 (Bruns, p. 302). The fiduciary nature of the transaction, when in the form of a mancipation, was expressed in the *uerba nuncupata*, as to which see § 104, note 7. A bronze tablet, with the record of a *mancipatio fiduciae causa* engraved thereon, supposed to be of the first

or second century, was found near Seville in 1867; the inscription is in Bruns, p. 180.

§ 61. Comp. Liv. xxii, 60; Varro de *L. L.* v, 40; Schol. Bob. in *or. pro Flacco* (ed. Bait. p. 244); Mommsen on *cautiones praedibus praediisque*, in his *Stadtrechte von Salpensa, etc.*, pp. 466, f.

ex praediatura possessionem usurecipi: nam qui mercatur a populo praediator appellatur.

- 62 Accidit aliquando ut qui dominus sit alienandae rei potestatem non habeat, et qui dominus non sit alienare possit.  
 63 Nam dotale praedium maritus inuita muliere per legem Iuliam<sup>1</sup> prohibetur alienare, quamvis ipsius sit uel mancipatum ei dotis causa uel in iure cessum uel usucaptum. quod quidem ius utrum ad italica<sup>2</sup> tantum praedia, an etiam ad  
 64 prouincialia<sup>3</sup> pertineat, dubitatur. Ex diuerso agnatus furiosi curator rem furiosi alienare potest ex lege XII tabularum;<sup>1</sup> item procurator — — — — —;<sup>2</sup> item creditor

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two years; this is the meaning of the common saying that possession is usurecapted *ex praediatura*, a purchaser from the state being called *praediator*.

- 62 It sometimes happens that he who is owner cannot alienate,  
 63 and that one who is not owner can. For by the Julian law a husband is forbidden to alienate dotal lands against the will of his wife, although they may have been mancipated to him or ceded to him in court or usucapted by him as a dotal provision. But it is a matter of doubt whether this prohibition is confined to immoveables of italic right or applies also to  
 64 provincial lands. Contrariwise the agnatic curator of a lunatic is empowered by the Twelve Tables to alienate his ward's property; a procurator [*may alienate perishables belonging to his [principal]*], and a creditor by agreement may alienate a pledge

§§ 62-64. Comp. pr. § 1, tit. I. *QVIBVS ALIENARE LICET VEL NON* (ii, 8). Adopting a suggestion of Heimbach's, most eds. place those pars. between §§ 79 and 80; and unquestionably there is some reason for so doing, as §§ 80-88 deal with the same subject-matter. But there does not seem to be sufficient to justify the transposition; which is the view taken by M. (K. u. S. p. xix).

§ 62. Pr. tit. I. afd.

§ 63. Comp. Paul. ii, 21b, § 2; pr. tit. I. afd.

<sup>1</sup> The enactment referred to is the *L. Iulia de adulteriis*, of the year 736 | 18.

<sup>2</sup> See i, 120, note 2.

<sup>3</sup> Comp. §§ 7, 21.

§ 64. <sup>1</sup> Comp. Cic. *de inu.* ii, 50, § 148;

*ad Herenn.* i, 13, § 33; Vlp. xii, 2; Schoell, *Tab.* v, 7.

<sup>2</sup> The first half of line 8, p. 69, is illegible in the ms. Bk. suggests—*id cuius libera administratio ei data est*; Gou.—*cui pecuniae administratio data est*; K. u. S.—*rem absentis, cuius negotiorum libera administratio ei permissa est*; M. (K. u. S. p. xx)—*si quid ne corrumpatur distrahendum est*; Hu.—*iure civili, cuius persona officio muneris eadem est*. None of these readings seems to correspond with the traces of individual letters made out by Stud.; but Mommsen's seems preferable in point of doctrine, a procurator not being entitled to sell anything but perishables without special mandate, fr. 63, D. *de proc.* (iii, 3).

pignus ex pactione, quamuis eius ea res non sit.<sup>3</sup> sed hoc forsitan ideo uideatur fieri quod uoluntate debitoris intelligitur pignus alienari, qui olim pactus est ut liceret creditori pignus uendere si pecunia non soluatur.

65 Ergo ex his quae diximus apparet quaedam naturali iure alienari, qualia sunt ea quae traditione alienantur, quaedam ciuili; nam mancipationis<sup>1</sup> et in iure cessionis<sup>2</sup> et usucapionis<sup>3</sup> ius proprium est ciuium Romanorum.

66 Nec tamen ea tantum quae traditione nostra fiunt naturali nobis ratione adquiruntur, sed etiam quae occupando ideo — — —<sup>1</sup> quia antea nullius essent, qualia sunt omnia quae

67 terra mari coelo capiuntur. Itaque si feram bestiam aut uolucrum aut piscem — — — — —<sup>1</sup> eo usque nostrum

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held by him, although it is not his. (But it may perhaps be held in the last case that the pledge is to be understood as alienated by consent of the debtor, who agreed in the outset that his creditor might sell it if the debt were not paid.)

65 It appears, therefore, from what has been said, that some things are alienated according to natural law,—those, for example, that are transferred by delivery,—and others according to the civil law; for mancipation, cession in court, and usucapion, are peculiar to Roman citizens.

66 But it is not only those things that become ours by delivery that we acquire on a natural title, but also what we appropriate by occupancy as previously unowned; such are all things that are captured either on land, in the sea, or in

67 the air. Therefore if we capture a wild beast, or a bird, or a fish, [*it becomes ours the moment it is caught,*] and is held to

<sup>3</sup> Comp. § 1, tit. I. afd.

§§ 65-79. Comp. §§ 11-34, tit. I. *DE REERV DIVISIONE* (ii, 1).

§ 65. Comp. Gai. in fr. 1, pr. D. *de A. R. D.* (xli, 1); § 11, tit. I. afd.

<sup>1</sup> Comp. i, 119.

<sup>2</sup> Comp. § 24.

<sup>3</sup> Comp. § 41.

§ 66. Comp. Gai. in fr. 1, § 1, D. *de A. R. D.* (xli, 1); § 12, tit. I. afd.

<sup>1</sup> There are about fourteen letters on line 20, p. 69, more or less illegible in the ms., of which various reconstructions have been proposed. The *nostra fecerimus* of Bk. doubtless expresses the meaning, though

it, like the other conjectural renderings, does not quadrate with the traces discernible.

§ 67. Comp. Gai. in fr. 3, § 2, fr. 5, pr. D. *de A. R. D.* (xli, 1); § 12, tit. I. afd.

<sup>1</sup> About a line and a half (lines 23, 24, p. 69) illegible, with exception of word *captum*. Bk. proposes—*ceperimus, quidquid ita captum fuerit, continuo nostrum fit, et eo usque, etc.*; Hu.—*ceperimus, simul atque captum hoc animal est, statim nostrum fit, et eo usque, etc.*; K. u. S.—*ceperimus, quidquid ita captum fuerit, statim nostrum fit, et eo usque, etc.*

- esse intellegitur donec nostra custodia coerceatur; cum vero custodiam nostram euaserit et in naturalem libertatem se receperit, rursus occupantis fit, quia nostrum esse *desinit*. naturalem autem libertatem recipere uidetur cum aut oculos nostros euaserit, aut licet in conspectu sit nostro difficilis
- 68 tamen *eius*<sup>2</sup> persecutio sit. In his autem animalibus quae ex consuetudine abire et redire solent, ueluti columbis et apibus, item ceruis qui in siluas ire et redire solent, talem habemus regulam traditam ut si reuertendi animum habere desierint etiam nostra esse desinant et fiant occupantium: reuertendi autem animum uidentur desinere habere cum
- 69 reuertendi consuetudinem deseruerint. Ea quoque quae ex hostibus capiuntur naturali ratione nostra fiunt.
- 70 Sed et id quod per adluuionem nobis adicitur eodem iure nostrum fit: per adluuionem autem id uidetur adici quod ita paulatim flumen agro nostro adicit ut aestimare non possimus quantum quoquo momento temporis adiciatur: hoc est quod uulgo dicitur per adluuionem id adici uideri quod ita paulatim

- continue ours so long as it is under the restraint of our keeping; but the moment it evades our custody and regains its natural liberty it becomes the property of the next captor, having ceased to be ours. And it is regarded as having regained its natural liberty when we can no longer see it, or
- 68 when, though still visible, its pursuit is difficult. As regards, however, such animals as are in the habit of going and coming, —pigeons, for instance, and bees, and deer, which are wont to go to the woods and come back again,—the rule is traditional that they cease to be ours and fall to the next captor when they no longer have the *animus reuertendi*; and that is held to have occurred when they have discontinued their
- 69 habit of returning. Things captured from an enemy also become ours by natural law.
- 70 By the same law that becomes ours which is brought to us by alluvion. That is held to be thus brought to us which a river adds to our land so gradually that we cannot appreciate how much is being added at any particular moment,—which, as the saying goes, is added so gradually as to elude our

<sup>2</sup> Instead of *eius*, which we have in the Dig. and Inst., the ms. reads *inrei*. M. (K. u. S. p. xx) suggests *inde rei*; Hu. in *re eius*.

§ 68. Comp. Gai. in fr. 5, § 5, D. de A. R. D. (xli, 1); §§ 14, 15, tit. I. afd.

§ 69. Comp. Gai. in fr. 5, § 7, D. de A. R. D. (xli, 1); § 17, tit. I. afd.

§ 70. Comp. Gai. in fr. 7, § 1, D. de A. R. D. (xli, 1); § 20, tit. I. afd.



- 71 adicitur ut oculos nostros fallat. Itaque si flumen partem aliquam ex tuo praedio resciderit, et ad meum praedium  
 72 attulerit, haec pars tua manet. At si in medio flumine insula nata sit, haec eorum omnium communis est qui ab utraque parte fluminis prope ripam praedia possident; si uero non sit in medio flumine, ad eos pertinet qui ab ea parte quae  
 73 proxima est iuxta ripam praedia habent. Praeterea id quod in solo nostro ab aliquo aedificatum est, quamuis ille suo nomine aedificauerit, iure naturali nostrum fit, quia  
 74 superficies solo cedit. Multoque magis id accidit et in planta quam quis in solo nostro posuerit, si modo radicibus  
 75 terram complexa fuerit. Idem contingit et in frumento  
 76 quod in solo nostro ab aliquo satum fuerit. Sed si ab eo petamus *fundum*<sup>1</sup> uel aedificium, et inpensas in aedificium uel in seminaria uel in sementem factas ei soluere nolimus, poterit nos per exceptionem<sup>2</sup> doli mali<sup>3</sup> repellere, utique si

- 71 vision. If, therefore, the [force of the] stream have torn away a part of your ground and swept it over to mine, the  
 72 part so detached still remains yours. An island rising in the middle of a river is the common property of the riparian proprietors; but if it be not in the middle of the stream it will  
 73 belong to the riparian owners on the nearer side. Further, what one has built on our ground, although he may have built it on his own account, by natural law becomes ours,  
 74 because the superstructure follows the *solum*. All the more is this the case with a plant which some person has planted in our ground, provided it have laid hold of the earth  
 75 with its roots. And the same happens with corn which  
 76 another person has sown in our ground. But if we claim from him the land or the house, yet decline to repay him his outlay in building, planting, or sowing, he can defeat us with an exception of fraud, at least if he have been a *bonae fidei*

§ 71. Comp. Gai. in fr. 7, § 2, D. *de A. R. D.* (xli, 1); § 21, tit. I. *afd.*

§ 72. Comp. Gai. in fr. 7, § 3, D. *de A. R. D.* (xli, 1); § 22, tit. I. *afd.*

§ 73. Comp. Gai. in fr. 7, § 12, D. *de A. R. D.* (xli, 1); §§ 29, 30, tit. I. *afd.*

§ 74. Comp. Gai. in fr. 6, § 13, D. *de A. R. D.* (xli, 1); § 31, tit. I. *afd.*

§ 75. Comp. Gai. in fr. 9, pr. D. *de A. R. D.* (xli, 1); § 32, tit. I. *afd.*

§ 76. Comp. Gai. in fr. 9, pr. D. *de A. R. D.* (xli, 1); §§ 30, 32, tit. I. *afd.*

<sup>1</sup> So Bk., Hu., and K. u. S.; the ms. has *fructum*.

<sup>2</sup> *Per exceptionem*; comp. iv, 116.

<sup>3</sup> *Exceptio doli mali* was the generic name for a plea by the defender, which, while admitting the pursuer's claim to be well-founded in strict law, yet disputed it in equity as involving fraud (iv, 119). But in many of its applications it was known by a more specific name, such as *ex rei uenditae et traditae, ex pacti conuenti, etc.*

- 77 bonae fidei possessor fuerit. Eadem ratione probatum est quod in chartulis siue membranarum meis aliquis scripserit, licet aureis litteris, meum esse, quia litterae chartulis siue membranarum cedunt: *at aequè*<sup>1</sup> si ego eos libros easque membranas petam, nec in pensam scripturae soluae, per exceptionem doli
- 78 mali ~~sum~~moueri potero. sed si in tabula mea aliquis pinxerit ueluti imaginem, contra probatur: magis enim dicitur tabulam picturae cedere; cuius diuersitatis uix idonea ratio redditur: certe secundum hanc regulam si me possidente petas imaginem tuam esse, nec soluas pretium tabulae, poteris per exceptionem doli mali ~~sum~~moueri; at si tu possideas, consequens est ut utilis mihi actio<sup>1</sup> aduersum te dari debeat;

- 77 possessor. Upon the same principle it is admitted that what one has written, even in letters of gold, on my paper or parchment, is mine, because the writing cedes to the paper or parchment; but here, in like manner, if I sue for the books or parchments, yet refuse to pay the cost of the writing, my
- 78 action may be defeated by an exception of fraud. If, however, some one has painted a portrait say on my pannel, the rule is reversed, and the pannel said to cede to the picture,—an anomaly for which no satisfactory reason can be assigned. According to this rule, if you raise an action against me who am in possession, and maintain that the portrait is yours, but fail to pay me the value of the pannel, you may be defeated by an exception of fraud. If, however, you are in possession, it results that I am entitled to an *utilis actio*

§ 77. Comp. Gai. in fr. 9, § 1, D. *de A. R. D.* (xli, 1); § 33, tit. I. *afid.*

<sup>1</sup> So Hu. in his earlier editions; the ms. has *itaque*.

§ 78. Comp. Gai. in fr. 9, § 2, D. *de A. R. D.* (xli, 1); § 34, tit. I. *afid.*

<sup>1</sup> It often happened that a man was unable to obtain the benefit of some judicial remedy introduced either by the common law, statutory enactment, or the praetor's edict, because, although his case was within the spirit of the provision upon which he was founding, it yet was not within the letter of it.

The remedy might have been promised to or against a particular class of individuals, but he or the party in relation to whom he desired relief might not belong to that class; or it might have been promised in certain specified circum-

stances, but those that had arisen, though generically the same, might yet specifically be different. In such a case the praetor was in the practice of intervening, and of introducing some modification—and there were various ways in which he did so—into the formula or style of the ordinary action, exception, or interdict (*actio directa* or *vulgaris*, *ex. dir.*, etc.), whereby such action was adapted to and made serviceable (*utilis*) in the special circumstances that had emerged. This is the meaning of *utilis actio* in its usual acceptation; and the phrases *utilis exceptio*, *utile interdictum*, were used in the same sense.

Sometimes the new remedy was one of such extensive applicability and great importance as to deserve a special name, as in the case of the

quo casu, nisi solutam impensam picturae, poteris me per exceptionem doli mali repellere, utique si bonae fidei possessor fueris. illud palam est, quod siue tu subripuisses tabulam siue alius, conpetit mihi furti actio.<sup>2</sup>

- 79 In aliis quoque speciebus naturalis ratio requiritur: proinde si ex uvis (*aut oliuis aut spicis*)<sup>1</sup> meis uinum aut oleum aut frumentum feceris, quaeritur utrum meum sit id uinum aut oleum aut frumentum, an tuum. item si ex auro aut argento meo uas aliquod feceris, uel ex tabulis meis nauem aut armarium aut subsellium fabricaueris; item si ex lana mea uestimentum feceris, uel si ex uino et melle meo mulsum feceris, siue ex medicamentis meis emplastrum aut collyrium feceris, [*quaeritur utrum tuum sit id quod ex meo [effeceris]*]<sup>2</sup> an meum. quidam materiam et substantiam spec-

against you; but then, if I decline to pay the cost of the picture, you can defeat me with an exception of fraud, at least if you are a *bonae fidei* possessor. It is clear that if either you yourself or another person obtained the pannel surreptitiously, I have an *actio furti*.

- 79 On a change of species also the question of ownership depends on natural considerations. Thus, if you have made wine, oil, or wheat out of my grapes, *olives, or ears of corn*, the question arises whether the wine, oil, or grain is mine or yours; just as, when you have made a vase of some sort out of my gold or silver, or have constructed a boat, or a chest, or a chair out of my planks, or have manufactured clothing out of my wool, or have converted my wine and honey into mead, or my drugs into a plaster or eye-salve, [*it becomes a question [whether what you have made out of my materials is yours]*] or mine. Some are of opinion that the raw material,—the sub-

*actio Publiciana*, which, by means of an interpolated fiction, was just an adaptation of the *rei uindicatio* to circumstances in which it was not strictly competent (iv, 36); but more frequently the ordinary name of the action, etc., whose range of usefulness was being thus extended, was retained, and the word *utilis* adjoined, as *utile iudicium familiae erciscundae*, *utile interdictum ne quid in loco publico, utilis actio de pecunia constituta*, etc.

In Gai. iii, 219, may be seen very distinctly the difference between the

*actio* and the *utilis actio ex lege Aquilia*; and from § 16, l. *de leg. Aq.* (iv, 3), it will be observed that even the *utilis actio*, under the name of *actio in factum ex lege Aquilia*, might be adapted to circumstances somewhat different from those to which it was usually applied.

<sup>2</sup> Comp. iii, 203.

- § 79. Comp. Gai. in fr. 7, § 7, D. *de A. R. D.* (xli, 1); § 25, tit. I. afil.

<sup>1</sup> Supplied from Inst.

<sup>2</sup> Supplied by L., and adopted by most eds.

tandam esse putant, id est ut cuius materia sit illius et res quae facta sit uideatur esse, idque maxime placuit Sabino et Cassio;<sup>3</sup> alii uero *eius rem* esse putant qui fecerit, idque maxime diuersae scholae auctoribus<sup>3</sup> uisum est: sed eum quoque cuius materia et substantia fuerit furti aduersus eum qui subripuerit habere actionem; nec minus aduersus eundem conductionem<sup>4</sup> ei competere, quia extinctae res, licet uindicari<sup>5</sup> non possint, condici tamen furibus et quibusdam aliis possessoribus possunt.

- 80 Nunc admonendi sumus neque feminam neque pupillum sine tutoris auctoritate rem Mancipi alienare posse; nec Mancipi uero feminam quidem posse, pupillum non posse.
- 81 ideoque si quando mulier mutuam pecuniam alicui sine tutoris auctoritate dederit, quia facit eam accipientis, cum scilicet pecunia res nec Mancipi sit, contrahit obligationem.
- 82 at si pupillus idem fecerit, quia [*pecuniam*] non (*facit accipi-*

stantial element, is to be looked at, that is to say, that the owner of the material is to be held the owner of the manufactured article; this is the view that commended itself to Sabinus and Cassius. Others are of opinion that the thing manufactured belongs to the maker of it,—the view preferred by the authorities of the other school; but that he to whom the material, the substance, belonged has not only an *actio furti* but also a *condictio* against him who has surreptitiously appropriated it; because, though things no longer extant cannot be vindicated, they may yet be claimed by condictio from thieves and certain other possessors.

- 80 We have next to be reminded that neither women nor pupils can alienate their *res Mancipi* without the *auctoritas* of their tutors; a woman, however, may herself alienate her *res nec Mancipi*, though a pupil cannot. Therefore if at any time a woman lend money without the authorization of her tutor, it is a valid obligation that she thereby contracts; for, as the money lent is a *res nec Mancipi*, she effectually makes it the
- 82 property of the borrower. But if a pupil do the same he

<sup>3</sup> See i, 196, note 1.

<sup>4</sup> Comp. iv, §§ 4, 5.

<sup>5</sup> Comp. iv, §§ 3, 5.

§§ 80-85. Comp. § 2, tit. I. QVIBVS ALIENARE LICET VEL NON (ii, 8), and see note to §§ 62-64. In the ms. §§ 80-85 are introduced with the rubric —R. V. De pupillis an ali-

quid a se alienare possunt, partly in the original, partly in a later hand.

§ 80. Comp. i, 192; ii, 47; Gai. in fr. 9, D. de auct. tut. (xxvi, 8); Vlp. xi, 27; Fr. Vat. § 1; § 2, tit. I. affd.

§ 81. Comp. iii, 90.

§ 82. Comp. § 2, tit. I. affd.; Th. ii, 8, § 2.



- (*entis*)<sup>1</sup> *sine tutoris auctoritate*,<sup>2</sup> *nullam* contrahit obligationem : unde pupillus vindicare quidem nummos suos potest sicubi extant, id est *eos petere suos ex iure Quiritium esse*,<sup>3</sup> — — — — — unde de pupillo quidem quaeritur *an nummos quos mutuos dedit ab eo qui accepit* — — — — *actione* eos  
 83 *persequi possit, quoniam* — — — — *potest*.<sup>4</sup> *At ex contrario omnes res tam Mancipi quam nec Mancipi mulieribus et*

- contracts no obligation, for he cannot pass the property of the money he is advancing without his tutor's *auctoritas* ; therefore the pupil may vindicate his coins as far as still extant, that is, may claim them as his in *quiritary* right, [it being incompetent for him to claim them in an action presupposing the [validity of the loan.] It is a question, however, whether, when the money advanced as a loan [has been consumed] by the receiver, the pupil may not then recover it by a [personal] action, seeing that he can [without his tutor's *auctoritas* acquire  
 83 [a claim founded on the consumption]. But, on the other hand, both *res Mancipi* and *res nec Mancipi* may be paid to

<sup>1</sup> These words, with exception of the last syllable (*tis*), are illegible in the ms., and borrowed from § 2, tit. I. *afd.*

<sup>2</sup> Those three words not in the Inst. ; but suggested by *s* in the ms. after the *tis* of *accipientis*, and in themselves almost necessary.

<sup>3</sup> K. u. S. and Hu. concur in the reading here given, though it is difficult to discern in the ms.

<sup>4</sup> The latter part of the par. (lines 18-23, p. 73, of ms.) is to a great extent illegible. K. u. S. suggest—*mulier uero minime hoc modo repetere potest, sed ita : DARI SIBI OPORTERE*. Vnde de pupillo quidem quaeritur, an, si nummi, quos mutuos dedit, ab eo qui accepit *bona fide consumpti fuerint, ex mutuo actione* eos persequi possit, quoniam *obligationem etiam sine tutoris auctoritate acquirere sibi* potest. M. (K. u. S. p. xx) suggests—*neque tamen stricto iure petere potest sibi eos dari oportere*. Vnde de pupillo quidem quaeritur an nummis quos mutuos dedit, ab eo qui accepit *consumptis, civili actione* eos persequi possit, quoniam *dari eos sibi oportere intendere non* potest. Hu. has—*mulier uero per mutui actionem a reo pecuniam re-*

*petere potest, sed non suum esse petere*. Vnde de pupillo quidem quaeritur, an nummis [*iis*] quos mutuos dedit, ab eo qui accepit *consumptis, aliqua actione* eos persequi possit, quoniam *nisi a possidente vindicari non* potest. None of these reconstructions is quite satisfactory.

The view given effect to in the translation is simply this : the pupil lending without *auctoritas* had no *actio ex mutuo*, for there was no valid *mutuum* ; but, if the money was still extant in the hands of the borrower, he might recover it by a *vindicatio* as still his own ; while if it had been consumed by the borrower, and so was no longer extant, he might claim the amount of it in a *condictio sine causa*, on the ground expressed by Pompon. in fr. 206, D. de R. I. (l. 16)—*iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiores*. See fr. 19, § 1, D. de reb. cred. (xii, 1).

§ 83. Comp. § 2, tit. I. *afd.* ; pr. I. *de auct. tut.* (i, 21). The rendering of the illegible half line (l. 24, p. 73) in the ms. seems obvious from the context, and is that adopted by both K. u. S. and Hu.

- pupillis sine tutoris auctoritate solui possunt, quoniam meliorem condicionem suam facere eis etiam sine tutoris auctoritate concessum est. itaque si debitor pecuniam pupillo soluat, facit quidem pecuniam pupilli; sed ipse non liberatur, quia nullam obligationem pupillus sine tutoris auctoritate dissolvere potest, quia nullius rei alienatio ei<sup>1</sup> sine tutoris auctoritate concessa est; sed tamen si ex ea pecunia locupletior factus sit et adhuc petat, per exceptionem doli mali<sup>2</sup> summoneri potest. Mulieri uero etiam sine tutoris auctoritate recte solui potest, nam qui soluit liberatur obligatione; quia res nec mancipi, ut proxime diximus,<sup>1</sup> a se dimittere mulier etiam sine tutoris auctoritate potest: quamquam hoc ita est si accipiat pecuniam; at si non accipiat, sed habere se dicat et per acceptilationem<sup>2</sup> uelit debitorem sine tutoris auctoritate liberare, non potest.
- Adquiritur autem nobis non solum per nosmet ipsos sed etiam per eos quos in potestate manu mancipiue habemus;

- women and pupils without their tutors' *auctoritas*, seeing that even without it they are free to better their condition.
- Therefore if a debtor pay money to a pupil he makes that money the pupil's: but he is not himself discharged; for a pupil, inasmuch as he is unable to alienate anything without his tutor's *auctoritas*, cannot without it extinguish any claim he has under an obligation. But if he be the richer for that money, and nevertheless sue for it, his action may be defeated by an exception of fraud. To a woman, however, payment may be made quite effectually even without her tutor's *auctoritas*; the debtor paying is freed from his obligation, because, as has just been explained, a woman does not need tutorial *auctoritas* in divesting herself of a *res nec mancipi*. At least this is the case if she have really received the money; if she have not received it, though she may say she has, and may mean to discharge her debtor by acceptilation without her tutor's authority, she cannot do so.
- Acquisitions are made for us not only through our own instrumentality but also through that of persons in our

§ 84. Comp. § 2, tit. I. afd.; Th. ii, 8,

§ 2.

<sup>1</sup> So quite distinctly in the ms.; but Hu. substitutes—*cui nec ullius rei alienatio sine*, etc.

<sup>2</sup> See § 76, note 3.

§ 85. Comp. iii, 171.

<sup>1</sup> See § 80.

<sup>2</sup> Acceptilation described iii, 169.

§§ 86-100. Comp. tit. I. *PER QVAS PER-SONAS NOBIS ADQVIRITVR* (ii, 9).

§ 86. Gai. in fr. 10, pr. D. *de A. R. D.* (xli, 1); pr. tit. I. afd. Comp. Vlp. xix, §§ 18-21.

item per eos seruos in quibus usumfructum habemus; item per homines liberos et seruos alienos quos bona fide posside-

87 mus: de quibus singulis diligenter dispiciamus. Igitur [quod] liberi nostri quos in potestate habemus, item quod serui mancipio accipiunt uel ex traditione nanciscuntur, siue quid stipulentur uel ex aliquolibet causa adquirant, id nobis acquiritur: ipse enim qui in potestate nostra est nihil suum habere potest; et ideo si heres institutus sit nisi nostro iussu hereditatem adire non potest; et si iubentibus nobis adierit, hereditas nobis acquiritur proinde atque si nos ipsi heredes instituti essemus; et conuenienter scilicet legatum per eos

88 nobis acquiritur: dum tamen sciamus, si alterius in bonis sit seruus, alterius ex iure Quiritium, ex omnibus causis ei

89 soli per eum adquiri cuius in bonis est. Non solum autem proprietas per eos quos in potestate habemus acquiritur nobis, sed etiam possessio; cuius enim rei possessionem adepti fuerint, id nos possidere uidemur; unde etiam per eos usu-

90 capio procedit. Per eas uero personas quas in manu man-

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*potestas, manus, or mancipium*, of slaves we are usufructing, and of freemen and other people's slaves possessed by us in good faith. We shall deal with each of those classes separately.

87 Whatever then our children *in potestate* or our slaves receive in mancipation or acquire by delivery, whatever claim they obtain either by stipulation or on any other ground, is acquired for us; for he who is *in potestate* can have nothing of his own. Therefore if he be instituted heir under a testament he cannot enter to the inheritance except on our instructions; and if we have ordered him to enter, the inheritance is acquired for us, just as if we ourselves had been instituted heirs. In like

88 manner a legacy to them is acquired for us. But let it be borne in mind that if a slave be *in bonis* of one person and in the quiritarian ownership of another, it is in every case for

89 his bonitarian proprietor alone that he acquires. It is not only property that is acquired for us by those in our *potestas*, but also possession: we are held to possess what they have acquired possession of; consequently through them we can

90 complete a usucapion. Through the instrumentality of

§ 87. Gai. in fr. 10, § 1, D. *de A. R. D.* (xli, 1). Comp. § 189; §§ 1, 2, tit. I. *afd.*; Vlp. xix, §§ 18, 19.

§ 88. Comp. §§ 40, 41; Vlp. xix, 20.

§ 89. Gai. in fr. 10, § 2, D. *de A. R. D.* (xli, 1); § 2, tit. I. *afd.*

§ 90. Nowhere does the reason appear why persons *in manu mancipio* should be less in the possession of the *paterfamilias* than his children *in potestate*. Comp. § 94; iii, 199; Modest. in fr. 54, § 4, D. *de A. R. D.* (xli, 1).



cipioe habemus proprietas quidem acquiritur nobis ex omni-  
 bus causis, sicut per eos qui in potestate nostra sunt; an  
 autem possessio adquiratur quaeri solet, quia ipsas non possi-  
 91 demus. De his autem seruis in quibus tantum usumfructum  
 habemus ita placuit, ut quidquid ex re nostra uel ex operis  
 suis adquirant id nobis adquiratur; quod uero extra eas  
 causas, id ad dominum proprietatis pertineat: itaque si iste  
 seruus heres institutus sit, legatumue *quid* ei [*aut*] *donatum*  
 92 fuerit,<sup>1</sup> non mihi sed domino proprietatis acquiritur. Idem  
 placet de eo qui a nobis bona fide possidetur, siue liber sit siue  
 alienus seruus: quod enim placuit de usufructuario, idem  
 probatur etiam de bonae fidei possessore: itaque quod extra  
 duas istas causas acquiritur, id uel ad ipsum pertinet si liber  
 93 est, uel ad dominum si seruus est. Sed bonae fidei pos-  
 sessor cum usuceperit seruum, quia eo modo dominus fit, ex  
 omni causa per eum sibi adquirere potest. usufructuarius

persons whom we hold *in manu* or *in mancipio* property is  
 acquired for us on any title, just as it is through that of  
 persons in our *potestas*; but it is a question whether we can  
 acquire possession through their means, seeing they them-  
 91 selves are not possessed by us. As regards a slave of  
 whom we have only a usufruct, the rule is that whatever he  
 acquires by his own labour, or by means of funds with which  
 we have provided him, is acquired for us, but that acquisi-  
 tions from any other source belong to his owner; therefore if  
 he be instituted heir or have something bequeathed or gifted  
 to him, the acquisition enures not to me but to his pro-  
 92 prietor. The same is the rule as regards a person *bona*  
*fide* possessed by us, whether he be a freeman or a slave  
 belonging to a third party: the doctrine applicable to a  
 usufructuary is equally applicable to a possessor in good faith;  
 whatever therefore is acquired by a person so possessed from  
 any other source than the two referred to, belongs to himself  
 93 if he be free, to his owner if he be a slave. When, how-  
 ever, the *bonae fidei* possessor usucaps the slave, as he thus  
 becomes his owner, he may in future acquire by his means  
 from any source. But a usufructuary cannot usucapt; firstly,

§§ 91-93. Gai. in fr. 10, §§ 3-5, D. *de*  
*A. R. D.* (xli, 1); §§ 4, 5, tit. I. *affd.*  
*Comp.* iii, §§ 164, 165; Vlp. xix, 21.

§ 91. <sup>1</sup> The ms. has *legatumue quod* (or  
*quid*, the contraction, *q*, applying to  
 either) *ei datum fuerit*, which K. u. S.

and Hu. retain. The correction in  
 the text is from the Inst. *Legatum*  
*dare* is a phrase not unknown to the  
 law, and is used frequently by Vlp.;  
 but it does not occur elsewhere in  
 Gai.



- uero usucapere non potest; primum quia non possidet sed habet ius utendi fruendi; deinde quia scit alienum seruum esse. De illo quaeritur, an per eum seruum in quo usumfructum habemus possidere aliquam rem et usucapere possimus, quia ipsum non possidemus. per eum uero quem bona fide possidemus sine dubio et possidere et usucapere possumus. loquimur autem in utriusque persona secundum definitionem quam proxime exposuimus, id est si quid ex re nostra uel ex operis suis adquirant. Ex his apparet per liberos homines quos neque iuri nostro subiectos habemus neque bona fide possidemus, item per alienos seruos in quibus neque usumfructum habemus neque iustam possessionem, nulla ex causa nobis adquiri posse. et hoc est quod uulgo dicitur per extraneam personam nobis adquiri *non posse. tantum de possessione* quaeritur an per (*procuratorem*)<sup>1</sup> nobis adquiratur. In summa sciendum est his qui in potestate manu mancipioe sunt nihil in iure cedi posse; cum enim istarum

- because he does not possess, but has only the right of using and taking fruits and profits; secondly, because he knows that the slave belongs to another. It is a question whether we can possess and usucapt through a usufructed slave, for he is not in our possession; but there is no doubt that we can possess and usucapt through a person whom we possess in good faith. (In both cases of course we are speaking under reference to the limitation already mentioned, namely, if their acquisitions be due to means we have furnished, or to their own labour.) From what has been said it is apparent that we cannot on any ground acquire through the instrumentality of freemen who are neither subject to our *potestas* nor possessed by us in good faith, nor yet by that of other people's slaves whom we do not hold either in usufruct or in lawful possession. This is the meaning of the adage that we cannot acquire through a stranger; the only doubt being about possession,—whether we cannot acquire it through the instrumentality of a *procurator*. Finally, it is to be observed that there can be no cession in court to those who are in our *potestas, manus, or mancipium*; for, as none of them can have

§ 94. Comp. § 4, tit. I. afd.

§ 95. Comp. Paul. v, 2, § 2; § 5, tit. I. afd.

<sup>1</sup> Only the first letter of *procuratorem* is legible in the ms. Hu. makes it *per personam liberam*, so as

to include a tutor or curator. But *persona libera* never occurs in Gai.; it is always *libera persona*. The Inst. have *per liberam personam, ueluti per procuratorem*.

§ 96. Comp. §§ 24, 87.

personarum nihil suum esse possit, conueniens est scilicet ut nihil suum esse<sup>1</sup> in iure uindicare possint.

- 97 [Hartmannus] tantisper admonuisse sufficit quaemadmodum singulae res nobis adquirantur: nam legatorum ius, quo et ipso singulas res adquirimus, opportunius alio loco referemus. uideamus itaque nunc quibus modis per uniuersitatem res  
 98 nobis adquirantur. Si cui heredes facti sumus,<sup>1</sup> siue cuius bonorum possessionem petierimus,<sup>2</sup> siue cuius bona emerimus,<sup>3</sup> siue quem adoptauerimus,<sup>4</sup> siue quam in manum ut uxorem  
 99 receperimus,<sup>5</sup> eius res ad nos transeunt. Ac prius de hereditatibus dispiciamus, quarum duplex condicio est: nam  
 100 uel ex testamento uel ab intestato ad nos pertinent. Et

anything of their own, it follows that they cannot appear before a magistrate and vindicate a thing as theirs.

- 97 Thus far we have said enough for the present about the [modes of] acquiring things singly; the matter of legacies, whereby also things are thus acquired, will be referred to more conveniently elsewhere. Let us now see how things are  
 98 acquired *per uniuersitatem*, [i.e. on a universal title.] If we have become heirs of any one, or have applied for possession of a deceased person's estate, or have bought the estate of an insolvent, or have adopted any one [by adrogation], or have received a woman into our *manus* as our wife, his or her  
 99 effects become ours. We shall deal first with inheritances; which are of two sorts,—those that come to us by testament,  
 100 and those that belong to us on intestacy. To begin with, let us see what falls to us by testament.

<sup>1</sup> The second *suum esse*, according to M., should be deleted as a gloss.

§§ 97-100. See § 6, tit. I. afd., from which the initial word of § 97, unwritten in the MS., is borrowed. The MS. has a vacant line before § 97, probably for a rubric.

§ 97. The law of legacies is introduced in § 191.

§ 98. This par. contains an enumeration of the principal varieties of universal acquisition (*adquisitio per uniuersitatem*).

<sup>1</sup> The succession of the *ius ciuile*, either under a testament (ii, §§ 104-190), or *ab intestato* (iii, §§ 1-52).

<sup>2</sup> Succession under the praetorian rules modifying those of the *ius*

*ciuile*; the explanations of them are dispersed through the passages referred to in last note.

<sup>3</sup> *Bonorum emptio* was purchase in gross of the estate of an insolvent; see iii, §§ 77-81.

<sup>4</sup> When a man adopted a *paterfamilias* by adrogation, the estate of the latter (so far as not annihilated by the *capitis deminutio*) *ipso iure* passed to the adrogator; iii, §§ 83, 84, compared with i, § 99.

<sup>5</sup> There was a similar *ipso iure* passage of a woman's estate to the man whose *manus* she entered, whether as his wife or merely *fiduciae causa*; iii, §§ 83, 84, compared with i, §§ 108-115.

prius est ut de his dispiciamus quae nobis ex testamento obueniunt.

- 101 Testamentorum autem genera initio duo fuerunt: nam aut calatis comitiis testamentum faciebant, quae comitia bis in anno testamentis faciendis destinata erant, aut in procinctu, id est cum belli causa arma sumebant; procinctus est enim expeditus et armatus exercitus. alterum itaque in pace et
- 102 in otio faciebant, alterum in proelium exituri. Accessit deinde tertium genus testamenti quod per *aes* et libram agitur: qui [*enim*] neque calatis comitiis neque in procinctu testamentum fecerat, is, si subita morte urgebatur, amico familiam suam, id est patrimonium suum, mancipio dabat, eumque rogabat quid cuique post mortem suam dari uellet. quod testamentum dicitur per *aes* et libram, scilicet quia per
- 103 mancipationem peragitur. Sed illa quidem duo genera testamentorum in desuetudinem abierunt; hoc uero solum quod per *aes* et libram fit in usu retentum est. sane nunc aliter ordinatur quam olim solebat; namque olim familiae emptor, id est qui a testatore familiam accipiebat mancipio,

- 101 Originally testaments were of two sorts; for they were made either *in calatis comitiis*—comitia that were convened twice a year for the purpose, or *in procinctu*, when the people were arming for battle; for *procinctus* means an army equipped and armed. The one sort therefore was made in time of peace and leisure, the other when the testator was going
- 102 forth on a campaign. Afterwards came a third sort,—that executed by the copper and the scales: he who had not made his testament either in the comitia or on the eve of battle, if urged by the imminent approach of death, conveyed his *familia*, i.e. his patrimony, by mancipation to a friend, whom he instructed what he wished to have given to each of his beneficiaries after his death. This is called a testament by the copper and the scales because it is executed by mancipation.
- 103 The two earlier varieties are out of date; that by the copper and the scales is the only one now in use. But it is very true that it is not now ordered as it was of old. Formerly the *familiae emptor*, that is to say the person who received the estate by mancipation from the testator, held the

§§ 101-108. Comp. tit. I. *DE TESTAMENTIS ORDINANDIS* (ii, 10).

§§ 101-103. Comp. Vlp. xx, 2; § 1, tit. I. *afd.*; Th. ii, 10, § 1; Gell.

xv, 27, §§ 1, 2; Paul. ex Festo, vv. *Endo procinctu* and *Procincta classis* (Bruns, pp. 241, 257).



heredis locum obtinebat, et ob id ei mandabat testator quid cuique post mortem suam dari uellet; nunc uero alius heres testamento instituitur a quo etiam legata relinquuntur, alius dicis gratia propter ueteris iuris imitationem familiae  
 104 emptor adhibetur. Eaque res ita agitur: qui facit [*testamen-*  
*[tum]*], adhibitis, sicut in ceteris mancipationibus,<sup>1</sup> v testibus ciuibus Romanis<sup>2</sup> puberibus et libripende, postquam tabulas testamenti scripserit, mancipat alicui dicis gratia familiam suam; in qua re his uerbis familiae emptor utitur: *FAMILIA*<sup>3</sup> *PECVNIAQVE*<sup>4</sup> *TVA ENDO MANDATELAM TVAM CVSTODELAMQVE*

position of heir, and therefore it was that the testator gave him instructions what he wished to be given to any particular individual after his death. But now one person is instituted heir in the testament, and on him the legacies are charged; while another is introduced merely for form's sake, in imita-  
 104 tion of the *familiae emptor* of the old law. The procedure is as follows: the testator having (as in all other mancipationes) obtained the attendance of five witnesses, Roman citizens above puberty, and a balance-holder, after he has written the tablets of his testament, as a matter of form mancipates his estate to some one. This person, the *familiae emptor*, makes use of these words: 'Your estate and belong-

§ 104. Comp. Vlp. xx, §§ 2, 9.

<sup>1</sup> Comp. i, § 119. It is to be observed that while *mancipatio* is spoken of there as *imaginarium uenditio*, the *test. per aes et libram* as here described was only *imaginarium mancipatio* (Vlp. xx, 2).

<sup>2</sup> Citizens or Junian latins, Vlp. xx, 8.

<sup>3</sup> The first part of the formula stands in the text as follows: *FAMILIAM PECVNIAQVE TVAM ENDO MANDATELA TVAM CVSTODELAQVE MEA, QVO TV IVRE TESTAMENTVM FACERE POSSIS . . . ESTO MIHI EMPTA*. The *m* at the end of the initial words has induced many eds., including Hu., to interpolate before the *QVO TV* the words *ex iure Quiritium esse aio, eaque*. But this subverts the idea of the proceeding. Studemund's revision has also shown the unwarrantableness of the *endo mandatele*, *TVTELA*, *custodelaque mea* of previous eds., strangely enough still retained by Hu.; it quite destroyed the force of the

formula,—'I take into my charge, but subject to your instructions.'

<sup>4</sup> Gai., § 102, defines *familia* as *patrimonium*; that makes it synonymous with *pecunia*, as defined by Paul. in fr. 5, D. de V. S. (l, 16). But the early jurists were not given to useless tautologies; and originally there must have been a distinction. Kuntze (*R. R.* ii, pp. 88, 89) is of opinion that *familia*, or *res familiaris*, included the family estate proper,—the *res Mancipi* attached to the family, and not easily alienable by the *paterfamilias*; *pecunia* the *res nec Mancipi*, the lesser articles that made up the *bona* held by the *paterfamilias* as *dominus*, and more fully at his disposal. Lange (*Roem. Alt.* i, pp. 129, 136) holds that in prehistoric Rome the *familia* could not be alienated by the *paterfamilias* either *inter uiuos* or *mortis causa*, but that the *bona* (*duona*) were alienable from the first. I am inclined to think that the distinction between the *familia* and *pecunia*



MEAM, QVO TV IVRE TESTAMENTVM FACERE POSSIS SECVNDVM LEGEM PVBLICAM,<sup>5</sup> HOC AERE (et ut quidam adiciunt AENEAQVE LIBRA) ESTO MIHI EMPTA;<sup>6</sup> deinde aere percutit libram, idque aes dat testatori uelut pretii loco. deinde testator tabulas testamenti tenens ita dicit: HAEC ITA VT IN HIS TABVLIS CERISQVE SCRIPTA SVNT, ITA DO, ITA LEGO, ITA TESTOR, ITAQVE VOS QVIRITES TESTIMONIVM MIHI PERHIBETOTE;<sup>7</sup> et hoc dicitur nuncupatio:<sup>8</sup> nuncupare est enim palam nominare, et sane

ings, be they mine by purchase, with this bit of copper (and,' as some add, 'these copper scales), subject to your instructions, but in my keeping, that so you may lawfully make your testament according to the statute;' then he strikes the scales with the coin, and gives the latter to the testator as if by way of price. The testator, holding his testamentary writings in his hand, then says: 'As is written in these tablets, so do I give, so do I legate, so do I declare my will; therefore, Quirites, grant me your testimony.' This last act is called the nuncupation, *nuncupare* meaning to declare publicly; whatever the testator has written in detail in his testa-

corresponded pretty nearly to that between estate by descent and purchase in England, or heritage and conquest in Scotland.

<sup>5</sup> The phrase *SECVNDVM LEGEM PVBLICAM*, which recurs in the formula of the *nexi liberatio*, in iii, 174, refers in all probability to some provision of the Twelve Tables,—either the general one recited by Gai. § 224, '*uti legassit suae rei, ita ius esto*,' or one not preserved to us that dealt specifically with this particular mode of testament-making.

<sup>6</sup> *Empta*, as already observed, (i, 113, note 2,) did not originally and of necessity mean acquired in property for a money price; says Paul. ex Festo, v. *Emere* (Bruns, p. 241) — '*Emere, quod nunc est mercari, antiqui accipiebant pro sumere*.'

<sup>7</sup> On the import of the phrase *testimonium perhibere* see Danz, *R. R.* ii, pp. 15–17, and authorities there quoted. It appears from Paul. iii, 4a, § 4, that the witnesses were not silent onlookers, but actual parties to the transaction; their part, according to Danz, being to affirm the regularity of the solemnity,—that the testament was

*iustum*, i.e. made according to law.

<sup>8</sup> Huschke (*Nexum*) has shown that part of the value of every *negotium per aes et libram*, whether employed in execution of a conveyance of property *inter vivos*, a bond, or a testamentary disposition, was its publicity,—its sanction and attestation by the five witnesses who were the representatives of the five Servian classes, and therefore of the nation. The *negotium per aes et libram*, latterly at least, was in all those cases a purely formal act; its import was defined by the *nuncupatio* that accompanied it, and which constituted the *lex Mancipii* (Gai. i, §§ 140, 172), *nexi*, or *testamenti* (fr. 14, D. *qui test. fac. poss.* xxviii, 1), as the case might be, and in reference to which we have in the Twelve Tables the provision (Fest. v. *Nuncupata*, ed. Muell., p. 173)—*cum nexum faciet Mancipiumque, uti lingua nuncupassit ita ius esto*. The declared terms of any jural transaction constituted its *lex*,—the law that governed it; and it is not improbable that it is to this *lex* that we owe the word *legare*,—'*uti legassit suae rei, ita ius esto*.'

quae testator specialiter in tabulis testamenti scripserit ea  
 105 uidetur generali sermone nominare atque confirmare. In  
 testibus autem non debet is esse qui in potestate est aut  
 familiae emptoris aut ipsius testatoris, quia, propter ueteris  
 iuris imitationem, totum hoc negotium quod agitur testamenti  
*ordinandi* gratia creditur inter familiae emptorem agi et testa-  
 torem: quippe olim, ut proxime diximus, is qui familiam  
 testatoris mancipio accipiebat heredis loco erat; itaque  
 106 reprobatum est in ea re domesticum testimonium. unde  
 et si is qui in potestate patris est familiae emptor adhibitus  
 sit, pater eius testis esse non potest; ac ne is quidem qui in  
 eadem potestate est, uelut frater eius. sed et si filiusfamilias  
 ex castrensi peculio<sup>1</sup> post missionem faciat testamentum, nec  
 pater eius recte testis adhibetur nec is qui in potestate patris  
 107 est. De libripende eadem quae et de testibus dicta esse  
 108 intellegemus: nam et is testium numero est. Is uero qui  
 in potestate heredis aut legatarii est, cuiusue heres ipse aut

mentary tablets he is regarded as declaring and confirming  
 105 by this general statement. No one ought to figure among  
 the witnesses who is in the *potestas* either of the *familiae*  
*emptor* or of the testator, seeing that, in imitation of the old  
 law, the whole business of ordering the testament is held to be  
 between those two parties; for, as already said, in old time  
 he who received the estate by mancipation from the testator  
 occupied the position of heir. It is for this reason that, in a  
 matter of this sort, the testimony of members of the same  
 106 household has been rejected. Accordingly if the person  
 acting as *familiae emptor* happen to be *in potestate*, his father  
 cannot be a witness; neither can any one in the same *potestas*  
 as he,—for instance, his brother. And even in the case of a  
*filiusfamilias* making a testament disposing of his *peculium*  
*castrense* after his discharge from the army, neither his father  
 nor any person in his father's *potestas* can officiate as a  
 107 witness. What has been said about witnesses applies  
 equally to the balance-holder; for he also is reckoned of their  
 108 number. But a man who is in the *potestas* of an heir or  
 legatee, or to whose *potestas* either of these is subject, or who

§ 105. Comp. Vlp. xx, §§ 3-5; § 9, tit. I. afđ.

§ 106. See references in last note.

<sup>1</sup> *Castrense peculium* was the separate estate amassed by a *filiusfamilias* while on military service,

and which he dealt with as *de facto* his own; see Vlp. xx, 10; Paul. iii, 4a, § 3; pr. I. *quib. non est perm.* (ii, 12).

§ 107. Comp. Vlp. xx, 3.

§ 108. Comp. §§ 10, 11, tit. I. afđ.

legatarius in potestate est, quique in eiusdem potestate est, adeo testis et libripens adhiberi potest, ut ipse quoque heres aut legatarius iure adhibeantur. sed tamen quod ad heredem pertinet quique in eius potestate est cuiusue is in potestate est, minime hoc iure uti debemus.

- 109 Sed haec diligens observatio in ordinandis testamentis militibus propter nimiam inperitiam constitutionibus principum remissa est: nam quamvis neque legitimum numerum testium adhibuerint neque uendiderint familiam neque nuncupauerint  
 110 testamentum, recte nihilo minus testantur. Praeterea permissum est iis et peregrinos et latinos instituere heredes uel iis legare; cum alioquin peregrini quidem ratione ciuili prohibeantur capere hereditatem legataque, latini uero per legem  
 111 Iuniam. Caelibes<sup>1</sup> quoque, qui lege Iulia<sup>2</sup> hereditatem legataque capere uetantur, item orbi,<sup>3</sup> id est qui liberos non habent, quos lex — — — — —<sup>4</sup>.

is *in potestate* of the same person as either of them, may be employed as a witness or balance-holder; nay, even an heir or legatee himself may lawfully so officiate. So far, however, as regards an heir, as well as those in his *potestas* and the person to whose *potestas* he is subject, we ought to take advantage of this right as seldom as possible.

- 109 But such strict observance of the formalities in ordering of testaments is dispensed with by imperial enactments in the case of soldiers, on account of their great inexperience in business matters; for although they may neither have provided the number of witnesses required by law, nor mancipated their *familia*, nor nuncupated their will, they do not  
 110 the less test validly. Further, they are allowed to institute latins and peregrins as their heirs, or to bequeath them legacies; whereas in the ordinary case peregrins are prohibited by the civil law from taking an inheritance or a legacy, and latins similarly prohibited by the Junian law.  
 111 Unmarried persons, though forbidden by the Julian law to take an inheritance or a legacy, and *orbi* or childless persons,

§§ 109-111. Comp. tit. I. *DE MILITARI TESTAMENTO* (ii, 11). Those three pars. are preceded by the rubric *de testamentis militum*, apparently in the same hand.

§ 109. Comp. § 114; Vlp. xxiii, 10; pr. tit. I. *afid.*

§ 110. Comp. i, 23; ii, §§ 218, 275; Vlp. xxii, §§ 2, 3.

§ 111. The conclusion of what Gai. said on the subject of soldier's testaments fails us, a leaf of the ms. (pp. 80\* and 80\*\*) being lost.

<sup>1</sup> Comp. §§ 144, 286; Vlp. xxii, 3.

<sup>2</sup> See i, 145, note 1.

<sup>3</sup> Comp. § 286a.

<sup>4</sup> Hu. completes the par. thus: quos lex *Papia plus quam dimidias*



112 — — — — — ex auctoritate diui Hadriani  
*senatusconsultum factum est quo permissum est (sui iuris)*<sup>1</sup>  
 feminis etiam sine coemptione testamentum facere, si modo  
 non minores essent annorum XII, *tutoribus auctoribus*;<sup>2</sup>

whom [*the Papian law does not allow to take more than a half  
 [of an inheritance or bequest that has been left to them, may take  
 [in full under a soldier's testament.]*]

112 [*It is not every one that can make a testament. Those can-  
 [not do so who are not sui but alieni iuris,—our children, that  
 [is to say, whether they be so by birth or by adoption. Neither  
 [can persons sui iuris, who are under the age of puberty, i.e.  
 [males under fourteen and females under twelve. Neither can  
 [persons who are insane, except during their lucid intervals.  
 [At one time neither could women of full age, if their tutors  
 [dissented, without going through the formality of coemption,  
 [and thus replacing their old tutors with others of their  
 [own selection, whose auctoritas they could command. But  
 [eventually] a senatusconsult was passed, on the proposition  
 of the emperor Hadrian, allowing women who were sui iuris  
 to make a testament without coemption, provided they were  
 not under the age of twelve, with the auctoritas of their tutors.*]

*partes hereditatis legatorumque  
 capere uetat, ex militis testamento  
 solidum capiunt. See §§ 286, 286a.*  
 §§ 112, 113. Comp. tit. I. *QVI BVVS NON EST  
 PERMISSVM TESTAMENTA FACERE*  
 (ii, 12). It is probable that on the  
 missing leaf, and on page 81, of  
 which all but the last three lines  
 are illegible, Gai. spoke of the testa-  
 mentary incapacity of persons *alieni  
 iuris*, lunatics, and pupils. In the  
 Epit. ii, 2, we have as follows:  
 § 1. *Id quoque statutum est, quod  
 non omnibus liceat facere testa-  
 mentum: sicut sunt hi qui sui iuris  
 non sunt sed alieno iuri subiecti, hoc  
 est filii tum ex nobis nati quam  
 adoptiui.* § 2. *Item testamenta  
 facere non possunt impuberes, id est  
 minores quattuordecim annorum,  
 aut puellae duodecim.* § 3. *Item et hi  
 qui furiosi, id est mente insani fuerint,  
 non possunt facere testamenta. sed  
 hi qui insani sunt, per interualla  
 quibus sani sunt possunt facere testa-  
 menta.* Comp. Vlp. xx, §§ 10-16.  
 § 112. Comp. i, 115a; Paul. iii, 4a,  
 § 1. The probable import of the  
 commencement of the par. is in-  
 dicated in the translation.

<sup>1</sup> Stud. notes that there is room  
 for *puberibus*; but the context ex-  
 cludes the possibility of such a word  
 having been used. Hu. suggests  
*capite non minutis*, as less 'insipid'  
 than *sui iuris*.

<sup>2</sup> For *tutoribus auctoribus* the ms.  
 has simply *tab*. Most eds. have  
 treated those letters as introduced  
*per incuriam*, under the idea that  
 XII *tab*. (meaning the Twelve  
 Tables) came so often from the  
 scribe's pen, that the *tab*. naturally  
 followed the XII when this was used  
 in a different collocation. But we  
 have *tutore auctore* represented con-  
 stantly by *ta.*, (as in the very next  
 par.); consequently there seems little  
 difficulty in rendering *tab*. by  
*tutoribus auctoribus*. No doubt the  
 phrase is unusual; but we have it  
 in i, § 115, and to all appearance it  
 occurs again in ii, § 118, which see.  
 Omitting those two words, Hu.  
 introduces *tutore auctore* between  
*testamentum* and *facere*. It would  
 rather appear from the terms of §  
 122, that after the *senatusconsult*  
 this *auctoritas* could rarely, if ever,  
 be withheld.



- [scilicet ut quae tutela liberatae<sup>3</sup> non essent ita<sup>4</sup> testari  
 113 deberent.]<sup>5</sup> Videntur ergo melioris condicionis esse feminae quam masculi; nam masculus minor annorum XIII testamentum facere non potest, etiamsi tutore auctore testamentum facere uelit; femina uero *post*<sup>1</sup> XII annum testamenti faciendi ius nanciscitur.<sup>2</sup>
- 114 Igitur si quaeramus an ualeat testamentum, inprimis aduertere debemus an is qui id fecerit habuerit testamenti factionem:<sup>1</sup> deinde, si habuerit, requiremus an secundum iuris ciuilis regulam testatus sit, exceptis militibus, quibus propter nimiam *inperitiam*, ut diximus,<sup>2</sup> quomodo uelint uel *quomodo possint* permittitur testamentum facere.

(This requirement, of course, applied only to those who had  
 113 not been released from tutelage.) Women, therefore, seem to be in a better position than men; for a male under fourteen cannot make a testament, even though he may wish to do so *tutore auctore*, whereas a female acquires the right of testament-making on reaching twelve.

114 In considering whether or not a testament is valid we must inquire, firstly, whether the maker had *testamenti factio*; secondly, whether he has made it according to the rules of the civil law, (unless he be a soldier, who, as already said, on account of his inexperience, is allowed to make a testament in any way he will or can.)

<sup>3</sup> Comp. i, 194; Vlp. xxix, 3.

<sup>4</sup> So the MS.; but most eds. substitute *tutore auctore*. This is unnecessary with *tut. auctoribus* in the preceding clause.

<sup>5</sup> The words *scilicet . . . deberent* look like a gloss.

§ 113. Comp. Vlp. xx, §§ 12, 15; pr. tit. I. afd.

<sup>1</sup> The MS. has *potest*; hence Hu. is induced to read—*femina uero potest*; [nam si est] *XII annorum, testamenti faciendi [tutore auctore] ius nanciscitur*.

<sup>2</sup> There is a vacant line in the MS. between this and the next par.

§ 114. Comp. Gai. in fr. 4, D. *qui test. fac. poss.* (xxviii, 1).

<sup>1</sup> It is very usual to say that *testamenti factio* was of three sorts—(1) capacity to make a testament, (2) capacity to be instituted heir or made a legatee in it, and (3)

capacity to act as a witness to it. There seems to be no sufficient warrant for the third. All that Vlp. says (xx, 2) is that the witnesses must be persons with whom the testator has *test. factio*, i.e. whom he may lawfully make his heirs or legatees. No doubt Vlp. also observes (xx, 8) that a Junian latin might witness a will, *quoniam cum eo test. factio est*; and it is assumed that this must have been *test. factio* of the third sort, because he had not the first. But then he had the second; he might be instituted heir, (Vlp. xxii, 3,) although he could not take the inheritance unless he became a citizen within a certain limited period. *Test. factio* of the first sort is called by the civilians *actiua*, that of the second *passiua*. Comp. § 4, I. *de qual. et diff. her.* (ii, 19).

<sup>2</sup> See § 109.

- 115 Non tamen ut iure ciuili *ualeat* testamentum sufficit ea  
 obseruatio quam supra exposuimus de familiae uenditione et  
 116 de testibus et de nuncupationibus:<sup>1</sup> ante omnia requiren-  
 dum est an institutio heredis sollemni more facta sit; nam  
 aliter facta institutione, nihil proficit familiam testatoris ita  
 uenire testesque ita adhibere et nuncupare ita testamentum ut  
 117 supra diximus. Sollemnis autem institutio haec est: TITIVS  
 HERES ESTO; sed et illa iam conprobata uidetur: TITIVM  
 HEREDEM ESSE IVBEO; at illa non est conprobata: TITIVM  
 HEREDEM ESSE VOLO; sed et illae a plerisque inprobatae sunt:  
 TITIVM HEREDEM INSTITVO, item: HEREDEM FACIO.
- 118 Obseruandum praeterea est, ut si mulier quae in tutela est  
 faciat testamentum, *tutoribus auctoribus id* facere debeat:<sup>1</sup>  
 119 alioquin inutiliter iure ciuili testabitur. Praetor tamen si  
 septem signis testium signatum sit testamentum, scriptis here-

- 115 It is not enough, however, to render a testament valid  
 according to the *ius ciuile* that all the rules we have above  
 explained about sale of the *familia*, witnesses, and nuncu-  
 116 cupations have been observed. Above all things we must  
 see whether the institution of the heir has been made with  
 the customary solemnity; if it has been made otherwise, then  
 it avails nothing that the testator's *familia* has been sold, the  
 witnesses adhibited, and the testament nuncupated in the  
 117 way previously described. Here is a solemn institution:  
 'Be Titius my heir;' and this one, 'I order that Titius shall  
 be my heir,' seems also to be approved; but, 'I wish Titius to  
 be heir,' is not approved, nor by most persons are these, 'I  
 institute Titius as heir,' and 'I make Titius my heir.'
- 118 It is further to be observed that if a woman who is in  
 tutelage make a testament, she must do so with *auctoritas* of  
 her tutors; otherwise, according to the civil law, her testa-  
 119 ment will be useless. If, however, it be sealed with the  
 seals of seven witnesses, the praetor will grant possession of

§§ 115-137. Comp. tit. I. *DE EXHEREDATIONE LIBERORVM* (ii, 13).

§ 115. Comp. pr. tit. I. *afid.*

<sup>1</sup> See § 104.

§ 116. Comp. § 229; Vlp. xxiv, 15; § 34, I. *de legat.* (ii, 20).

§ 117. Comp. Vlp. xxi. All this '*in-  
 anis obseruatio*' abolished by Constantius, l. 15, C. *de test.* (vi, 23).

§ 118. Comp. i, 192; ii, 112; iii, 43; Vlp. xx, 16.

<sup>1</sup> The MS. has *tutores habet facere debeat*. K. u. S. and Hu., like previous eds., read *tutore auctore fac. deb.* I prefer the reading given above; the original probably was *tut. ab. (or tab.) id facere debeat*, which has been wrongly apprehended by the copyist in transcribing. See § 112, note 2.

§ 119. Comp. § 147; Cic. *II. Verr.* i, 45, § 117; Vlp. xxiii, 6; xxviii, 6.

dibus secundum tabulas testamenti *bonorum possessionem*<sup>1</sup> pollicetur,<sup>2</sup> [et] si nemo sit ad quem ab intestato iure legitimo pertineat hereditas, uelut frater eodem patre natus aut patruus aut fratris filius, ita poterunt scripti heredes retinere hereditatem: nam idem iuris est et si alia ex *causa* testamentum non ualeat, uelut quod familia non uenierit aut nuncupationis

the defunct's estate to the testamentary heirs in terms of the will. If in such a case there be no one on whom the estate devolves by law as heir *ab intestato*, say a brother by the same father, or a father's brother, or a brother's son, the heirs nominated in the testament will be in a position to retain the inheritance; for the rule is the same here as if the testament were invalid on some other ground, as, for instance, failure on the part of a testator to mancipate his *familia* or

<sup>1</sup> *Bonorum possessio* was one of the most important institutions of praetorian equity, often spoken of as praetorian succession, in contradistinction to the *hereditas* or succession of the *ius ciuile*,—the right of beneficial enjoyment of a deceased person's estate, and that *tutione praetoris*, even though the legal title of heir might for some reason be wanting.

It was of three varieties—(1) *b. p. secundum tabulas*, (2) *b. p. contra tabulas*, and (3) *b. p. intestati*.

The first—that referred to in this par., and again in § 147—was granted when the wishes of a testator were in danger of being frustrated because of some informality of his testament which rendered it in law invalid; the testamentary heir in such a case often obtained a grant of *bonor. possessio* according to the tenor of the will, which prevented the succession passing to the heir *ab intestato*.

The second was granted in cases where the testament was in point of form unchallengeable, yet in its provisions inequitable, as when an emancipated child of the testator's was passed over (§ 135); the testament was not upset, because *iure ciuili* it was quite valid, but the *praeteritus* was allowed to participate to a greater or smaller extent in the benefits of the succession by *bon. pos. contra tabulas*, i.e. against the tenor of the will.

The third was granted on intestacy

to those who were not heirs *ab intestato* according to the rules of the *ius ciuile*, but preferred to such persons by the more equitable provisions of the praetor's edict; see examples in iii, §§ 26–31.

As Gai. points out in iii, 32, the grantee of any of those *bonor. possessiones* did not thereby become heir, *nam praetor heredes facere non potest*. He was therefore unable to make use of the legal remedies available to heirs for the realization and protection of their rights; so that it became necessary for the praetor to devise new remedies on his behalf.

These were in some respects more efficient than those competent to heirs. Whence this result,—that a man, whose position as heir under the civil law was unchallenged and unchallengeable, often deemed it advisable to fortify it with a grant of *bon. possessio*, that so he might have the advantage of the remedies competent to a *bonor. possessor* (iii, 34).

The subject of *bonor. possessio* is dealt with in tit. I. iii, 9.

<sup>2</sup> *Bon. pos. polliceri, in integrum restitutionem polliceri*, and such like, are technical expressions for the praetor's declaration in his Edict that in such or such cases he would grant such or such a remedy. To say that he 'promises' it, might lead to misunderstanding; therefore 'grants' or 'will grant' is preferred in the translation.

- 120 uerba testator locutus non sit. Sed uideamus an<sup>1</sup> etiamsi frater aut patruus extent potiores scriptis heredibus habeantur: rescripto enim imperatoris Antonini<sup>2</sup> significatur eos qui secundum tabulas testamenti non iure factas bonorum possessionem petierint, posse aduersus eos qui ab intestato uindicant hereditatem defendere se per exceptionem doli mali.<sup>3</sup> quod sane quidem ad masculorum testamenta pertinere certum est; item ad feminarum quae ideo *non* utiliter testatae sunt quod uerbi gratia familiam non uendiderint aut nuncupationis uerba locutae non sint: an autem et ad ea testamenta feminarum quae sine tutoris auctoritate fecerint haec constitutio pertineat
- 122 uidebimus.<sup>1</sup> Loquimur autem de his scilicet feminis quae non in legitima parentium aut patronorum tutela sunt, sed de his quae alterius generis tutores habent, qui etiam inuiti coguntur auctores fieri:<sup>1</sup> alioquin parentem et patronum sine auctoritate eius facto testamento non summoueri palam est.

- 120 pronounce the words of nuncupation. But is it the case that a brother or a father's brother, supposing them to exist, are really preferred to the heirs named in the testament? [Hardly]; for by a rescript of our emperor Antonine's it is declared that persons who have applied for possession of a defunct's estate in terms of a testament not executed according to law, can defend themselves with an exception of fraud
- 121 against those claiming the inheritance *ab intestato*. That this rescript applies to testaments of men is certain; and it is equally certain that it applies to any made by women that are invalid because they have omitted to mancipate their *familia* or to recite the words of nuncupation: but whether it applies to such testaments of theirs as have been made without tutorial *auctoritas* is a matter for consideration.
- 122 We are referring, of course, to women who are not under the tutory-at-law of parents or patrons, but have tutors of some other sort,—tutors who may be compelled to grant their *auctoritas* whether they will or not: that a parent or patron is not to be displaced by a testament made without his *auctoritas* is quite clear.

§ 120. Comp. § 149, and notes.

<sup>1</sup> Hu. and several other eds. interpolate *non* after *an*, entirely subverting the meaning of the par.

<sup>2</sup> Doubtful whether it be Antoninus Pius or Marcus Aurelius that is here referred to; probably the

latter, as the former is referred to in § 195 as *diuus Pius*.

<sup>3</sup> See § 76, note 3.

§ 121. Comp. §§ 104, 115, 118.

<sup>1</sup> The question is answered indirectly in next par.

§ 122. Comp. i, §§ 190, 192.

<sup>1</sup> Comp. § 115.



- 123 Item qui filium in potestate habet curare debet ut eum uel heredem instituat uel nominatim<sup>1</sup> exheredet; alioquin si eum silentio praeterierit inutiliter testabitur: adeo quidem ut nostri praeceptores<sup>2</sup> existiment, etiamsi uiuo patre filius defunctus sit, neminem heredem ex eo testamento existere posse, quia scilicet statim ab initio non constiterit institutio; sed diuersae scholae auctores,<sup>2</sup> si quidem filius mortis patris tempore uiuat, sane inpedimento eum esse scriptis heredibus [et illum ab intestato heredem fieri]<sup>3</sup> confitentur; si uero ante mortem patris interceptus sit, posse ex testamento hereditatem adiri putant, nullo iam filio inpedimento; quia scilicet existimant [*non*]<sup>4</sup> statim ab initio inutiliter fieri testamentum filio praeterito. Ceteras uero liberorum personas si praeterierit testator ualet testamentum. [*sed*] praeteritae istae personae scriptis heredibus in partem ad crescunt,<sup>1</sup> si sui

- 123 Moreover, a testator who has a son *in potestate* must take care either to institute him as heir or by name to disinherit him; if he pass him over in silence his testament will be useless. So far do the authorities of our school carry this doctrine that, even though the son predecease his father, they hold there can be no heir under the testament, the institution having been void from the first. Those of the other school, however, while they admit that, if the son survive his father, the heirs nominated in the testament will be cut out by him and he take *ab intestato*, yet are of opinion that, if he predecease his father, the inheritance may be taken up under the testament, the son being no longer an obstacle; for their view is that a testament is not *ab initio* invalid because a son of
- 124 the testator's has been passed over. If, however, it be not a son but other descendants [*in potestate*] that have been passed over, the testament is valid; but those passed over come in for a share by accretion along with the heirs nomi-

§ 123. Pr. tit. I. afd. Comp. Vlp. xxii, 16. From these it appears that the Sabinian doctrine, approved by Gai., was still adhered to as the true one. The *sui heredes* were joint-owners with the *paterfamilias* during his lifetime (§ 157), but without administration; and on his death they simply continued their ownership (Paul. in fr. 11, D. *de lib. et post.* xxviii, 2), unless, by testamentary disinheritance, he had effectually deprived them of their right. So it was at least in the case of sons.

<sup>1</sup> This did not mean 'by name' in the strictest sense of the words, § 127; and probably it was enough that there was a distinct indication who was intended. See Gai. in fr. 24, D. *de man. uind.* (xl, 4).

<sup>2</sup> See i, 196, note 1.

<sup>3</sup> With P., I am disposed to regard the words within brackets as a gloss.

<sup>4</sup> This *non* is approved by all eds. § 124. Comp. Vlp. xxii, 17; pr. tit. I. afd.

<sup>1</sup> There was accretion to the heirs, —their number was increased.

heredes<sup>2</sup> sint in *uirilem*, si extranei in dimidiam: id est, si quis tres uerbi gratia filios heredes instituerit et filiam praeterierit, filia adcrecendo pro quarta parte fit heres, et ea ratione id consequitur quod ab intestato patre *mortuo* habitura esset; at si extraneos ille heredes instituerit et filiam praeterierit, filia adcrecendo ex dimidia parte fit heres. quae de filia diximus eadem et de nepote deque omnibus liberorum personis *seu* masculini seu feminini sexus dicta intellegemus.

- 125 Quid ergo est? licet eae, secundum ea quae diximus, scriptis heredibus dimidiam partem *modo* detrahant, tamen praetor eis contra tabulas bonorum possessionem promittit, qua ratione extranei heredes a tota hereditate repelluntur et  
126 *efficiuntur* sine re heredes.<sup>1</sup> et hoc iure *utebatur*, quasi<sup>1</sup> nihil inter feminas et masculos interesset: sed nuper imperator Antoninus<sup>2</sup> significauit rescripto *suas*<sup>3</sup> non plus nancisci feminas per bonorum possessionem quam quod iure adcrescendi

nated in the will,—an equal share if these be *sui heredes*, a half of the whole inheritance if they be strangers. In other words, if a man have instituted say his three sons as his heirs, but have passed over his daughter, she by accretion becomes heir to the extent of a fourth of the inheritance, and by this means obtains exactly what she would have been entitled to on her father's death had he died intestate; but if a testator have instituted strangers as his heirs, and passed over his daughter, she by accretion becomes heir for a half. And as with a daughter, so with a grandson or any other descendant, whether male or female, [except a son.] But what of that? Although, according to this statement of the law, they cut the heirs nominated in the testament out of only a moiety of the inheritance, yet the praetor promises them possession of the defunct's estate contrary to the tenor of the will, so that the stranger-heirs are really excluded from the whole inheritance, and become heirs in name only, *heredes sine re*.

- 126 This was the law we used to act upon, as if there were no difference between males and females; but recently our emperor Antonine has intimated, by a rescript of his, that in future women shall obtain no more by grant of possession of

<sup>2</sup> See §§ 156, 157.

§ 125. Comp. § 129; Vlp. xxviii, §§ 2, 3.

<sup>1</sup> Comp. § 148; Vlp. xxviii, 13.

§ 126. Comp. Iust. in l. 4, C. de lib. praet. (vi, 28).

<sup>1</sup> So Stud.: only the final *i* is visible in the ms.

<sup>2</sup> See § 120, note.

<sup>3</sup> The ms. and K. u. S. have *suo*, referring to *rescripto*; P. and Hu. *suas*, referring to *feminas*, and thus distinguishing them from the *emancipatae* in next line.

- consequerentur. quod in emancipatarum quoque personis  
*observandum est: (nam quod praeteritae)*<sup>4</sup> adcrescendi iure  
habiturae essent si in potestatae fuissent, id ipsum etiam per  
127 bonorum possessionem habeant. *Sed si quidem* filius a  
patre exheredetur, nominatim<sup>1</sup> exheredari *debet, alioquin* non  
*prodest eum*<sup>2</sup> exheredari. nominatim autem exheredari uidetur  
siue ita exheredetur: *TITIVS FILIVS MEVS EXHERES (ESTO, siue*  
*(ita: FILIVS MEVS)*<sup>3</sup> EXHERES ESTO, non adiecto proprio nomine.  
128 *Ceterae uero* liberorum personae, uel feminini sexus uel mas-  
culini, *satis* inter ceteros exheredantur, *id est his uerbis:*  
*(CETERI)*<sup>1</sup> OMNES EXHEREDES SVNTO: *quae uerba (semper post)*<sup>2</sup>  
129 institutionem heredum adici solent. *Sed hoc ita (est iure*  
*(civili);*<sup>1</sup> nam praetor omnes uirilis sexus (*liberos, tam filios*  
*(quam ceteros),*<sup>2</sup> id est nepotes quoque et pronepotes, — — —  
— — — — —.<sup>3</sup>

- the defunct's estate than they are entitled to by accretion.  
And this rule applies also to women who have been eman-  
cipated; for, *if they be passed over*, they are to take no more  
by *bonorum possessio* than they would have got by accretion  
127 had they been still *in potestate*. If a son be disinherited  
by his father it must be by name,—disinheritance in any other  
way does no good; and he is held to be nominately disin-  
herited either thus: 'Be my son Titius disinherited,' or thus:  
'Be my son disinherited,' without the addition of any proper  
128 name. But other descendants, whether male or female, are  
sufficiently disinherited *inter ceteros*, that is by such words as,  
'Be all the others disinherited,' which are usually inserted  
129 after the institution of the heirs. Such is *the rule of the*  
*civil law*. But the praetor requires that all descendants of  
the male sex—*not sons only*, but others also, such as grand-  
sons and great-grandsons—[*shall be disinherited by name; but*

<sup>4</sup> So P.; K. u. S. suggest *ut hae quoque quod*; Hu. *ut nimirum hae quoque quod*.

§ 127. Comp. Vlp. xxii, 20; § 1, tit. I. afd.

<sup>1</sup> See § 123, note.

<sup>2</sup> So P., on the strength of §§ 140, 141; the ms. has *psiet*; K. u. S. *uidetur*.

<sup>3</sup> The words in parenthesis, illegible in the ms., are supplied from the Inst.

128. Comp. Vlp. xxii, 20; pr. § 1, tit. I. afd.; Iust. in l. 4, C. *de lib. praet.* (vi, 28).

<sup>1</sup> *Ceteri* seems the obvious read-

ing, although the space is rather too great for it.

<sup>2</sup> Illegible, but obvious enough. A nominate disinheritance, according to a rescript of Trajan's, might either precede or follow the institution; see Vlp. in fr. 1, pr. D. *de her. inst.* (xxviii, 5).

§ 129. Comp. § 135.

<sup>1</sup> The context naturally suggests this reading.

<sup>2</sup> So K. u. S.; P. and Hu. have *liberorum personas*; only the initial *lib* is legible in the ms.

<sup>3</sup> Hu. suggests as completion of



- 130 Postumi quoque liberi (*uel heredes*) institui debent uel ex-  
 131 heredari. Et in eo par omnium condicio (*est, quod et in*) filio  
 (*postumo et in quolibet ex ceteris*) liberis, siue (*feminini sexus siue*)  
 masculini, praeterito, ualet (*quidem testamentum, sed postea*  
 (*agnatione postumi*) siue postumae rumpitur, et ea ratione  
 (*totum*) infirmatur. (*ideoque*) si mulier ex qua (*postumus aut*  
 (*postuma*) sperabatur abortum (*fecerit, nihil impedimento est*  
 132 (*scriptis heredibus ad hereditatem adeundam. Sed feminini*)  
 quidem sexus personae (*uel nominatim uel*) inter ceteros (*exhere-*  
 (*dari solent, dum tamen si inter ceteros exheredentur aliquid eis*  
 (*legetur, ne uideantur per obliuionem*) praeteritae (*esse: masculini*  
 (*uero sexus personas*) placuit non aliter recte (*exheredari nisi*  
 (*nominatim exheredentur, hoc scilicet modo: QVICVMQVE MIHI*

[allows females, daughters, that is to say, and granddaughters  
 [and great-granddaughters, to be disinherited either by name or  
 [in the ceteri clause.]

- 130 Descendants that may possibly be born after the making  
 of a testament must also be either instituted or disinherited.  
 131 They are all on the same footing in this respect,—that,  
 whether it be a son or any other male or female descendant to be  
 born after the making of the testament that is unmentioned in  
 it, it is nevertheless valid; but on the agnation of any such  
 after-born, it is broken and thereby rendered altogether void.  
 Therefore if a woman from whom a child is expected mis-  
 carry [after the execution of a testament], there is nothing to  
 prevent the heirs named in it entering upon the inheritance.  
 132 Females may be disinherited either by name or amongst 'the  
 others,' the precaution being taken, when they are disinherited  
 by the latter mode, of leaving them a legacy to show that they  
 have not been passed over through forgetfulness; but, as regards  
 after-born males, it has been held that they cannot validly be  
 disinherited otherwise than by name, thus: 'Any son that

the par. — *nominatim exheredari iubet, feminini uero sexus liberos, id est filias et neptes et proneptes, exheredari aut nominatim aut inter ceteros satis habet.* This will about fill the vacant two lines and a quarter (lines 8-10, p. 86).

- §§ 130-134. Pp. 86 and 87 of the ms. are for the most part illegible; but those pars. are reproduced in the Inst.—the two last also in an extract from Gai. in the Dig.,—and

from them completed. Between lines 2 and 11 of p. 87 there seems to have been some matter which Justinian has not reproduced; it is indicated as § 132<sup>o</sup>. In the ms. § 130 runs—*Postumi quoque liberi nominatim, etc.*; the *nominatim* has been excluded as an inaccurate gloss. The word *postumi* can be adequately rendered in the translation only by a periphrasis. §§ 130-132. § 1, tit. I. afd. Comp. Vlp. xxii, §§ 15, 18-21; xxiii, 2.



132a (*FILIVS GENITVS FVERIT, EXHERES ESTO*). [132a] — — —

133 — — — — —. (*Postumorum autem loco sunt et hi qui in (sui heredis locum succedendo quasi agnascendo fiunt parenti- (bus) sui heredes: ut ecce si filium et (ex eo nepotem) neptemue (in potestate habeam, quia filius gradu praecedit, is solus iura (sui heredis habet, quamvis nepos) quoque et neptis ex (eo in (eadem potestate sint; sed si filius meus me uiuo moriatur, aut (qualibet ratione exeat de potestate mea, incipit nepos neptisue in (eius locum succedere, et) eo modo iura suorum (heredum quasi*

134 (*agnatione*) nanciscuntur. Ne ergo eo modo rumpatur mihi testamentum, (*sicut ipsum filium uel heredem*) instituere uel exheredare debeo ne (*non iure faciam testamentum, ita et*) nepotem neptemue ex eo necesse est mihi (*uel heredem instituere (uel exheredare, ne forte, me uiuo filio mortuo, succedendo in (locum eius nepos neptisue)*) quasi agnatione rumpat testa- mentum: idque lege Iunia Vellaea<sup>1</sup> prouisum est—in qua simul exheredationis modus notatur—ut uirilis sexus [*postumi*] nominatim, feminini uel nominatim uel inter ceteros exhere-

132a may be born to me hereafter is hereby disinherited.' [132a] —

133 — — — — —. *In the same position as after-born descendants are those who, on coming in place of a suus heres, by quasi-agnation become sui heredes of their parents. For example, if I have in my potestas a son and a grandchild, male or female, by that son, the latter, being of the nearer degree, alone has the rights of a suus heres, notwithstanding that my grandchild by him is also in my potestas; but if my son die in my lifetime, or for any reason cease to be in my potestas, my grandchild steps into his place, and thus by quasi-agnation*

134 *acquires the privileges of a suus heres. Now, just as I must either institute or disinherit my son in order to make my testament legally valid ab initio, so must I, in order to prevent its being broken, either institute or disinherit my grandchild by that son, lest possibly the latter should die during my life- time, and my grandchild, succeeding in his father's place, should break my testament by quasi-agnation. And it was expressly enacted by the Junia-Velleian law—in which the form of disinheriting is at the same time described—that males must be disinherited by name, while females may be*

§ 133. Gai. in fr. 13, D. de iniusto rupto (xxviii, 3); § 2, tit. I. afd.; Vlp. xxiii, 3.

§ 134. See refs. in last note.

<sup>1</sup> So the law is named in the ms.,

*it is generally supposed to have been'*

though usually called Junia Velleia. It was enacted probably in the year 799 ↑ 46, and consulate of M. Junius Silanus and Velleus Tutor; see fr. 2, pr. D. ad SC. Velleian. (xvi, 1). but as *imperator consules* had by this time taken the place of *leges*, it probably was of earlier date. p. 1136.

dentur, dum tamen iis qui inter ceteros exheredantur aliquid legetur.

- 135 Emancipatos liberos iure ciuili neque heredes instituere neque exheredare necesse est, quia non sunt sui heredes: sed praetor omnes, tam feminini quam masculini sexus, si heredes non instituuntur exheredari iubet, uirilis sexus nominatim, feminini uel nominatim uel inter ceteros: quodsi neque heredes instituti fuerint neque ita ut supra diximus exheredati, praetor promittit eis contra tabulas bonorum possessionem.<sup>1</sup>
- 135a In potestate patris non sunt qui cum eo ciuitate Romana donati sunt, nec in accipienda ciuitate Romana *pater petiit*<sup>1</sup> a *principe*<sup>2</sup> ut eos in potestate haberet, *aut si* petiit non impetrauit; nam qui *in potestatem* patris ab imperatore rediguntur
- 136 nihil differunt — —.<sup>3</sup> Adoptiui filii, quamdiu manent

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disinherited either by name or *inter ceteros*, provided in the latter case some legacy be left them.

- 135 By the civil law it is unnecessary either to institute or disinherit emancipated children, because they are not *sui heredes*. But the praetor requires that, if they be not instituted, they shall all, both males and females, be disinherited,—the former by name, the latter either by name or amongst ‘the others.’ If they be neither instituted heirs nor disinherited in the manner aforesaid, the praetor will grant them *bonorum possessio contra tabulas*, [*i.e.* possession of the defunct’s estate contrary to the
- 135a tenor of his testament.] Those children are not in their father’s *potestas* who have obtained along with him a gift of citizenship, if either the *potestas* had not been specially applied for from the sovereign, or, being applied for, had not been granted; but those who have been subjected by the emperor to their father’s *potestas* differ in no respect from
- 136 [*children born in it*]. Further, adoptive sons, so long as

§ 135. § 3, tit. I. afd. Comp. Vlp. xxii, 23; xxviii, 4. But it was under condition of collation with the unemancipated *sui heredes*, at least in the time of Vlp.

<sup>1</sup> Comp. § 119, note 1.

§ 135a. Comp. i, §§ 93, 94; iii, 20; Vlp. in *Collat.* xvi, 7, § 2. Some words in the ms. are indistinct, and one or two illegible.

<sup>1</sup> The indistinct letters in the ms. do not resemble *petiit*,—there is too much space for it. The sense, how-

ever, suggests it; and Hu., to prolong it, adds *statim*.

<sup>2</sup> So I think may be rendered the *ap* of the ms., which K. u. S. ignore, and Hu. renders *aut post*.

<sup>3</sup> The ms. appears to have something like *athisunit*. P. suggests *ab suis hereditibus*, and Hu. *a sic natis*; as K. u. S. observe, one might expect *ab his qui in potestate patris nati sunt*.

§ 136. Comp. § 4, tit. I. afd.

- in adoptione, naturalium loco sunt; emancipati uero a patre adoptiuo, neque iure ciuili neque quod ad edictum praetoris  
 137 pertinet inter liberos numerantur. Qua ratione accidit ut ex diuerso, quod ad naturalem parentem pertinet, quamdiu quidem sint in adoptiua familia extraneorum numero habeantur; si uero emancipati fuerint ab adoptiuo patre, tunc incipiant in ea causa esse qua futuri essent si ab ipso naturali patre [*emancipati*] fuissent.
- 138 Si quis post factum testamentum adoptauerit sibi filium, aut per populum eum qui sui iuris est, aut per praetorem eum qui in potestate parentis fuerit, omni modo testamentum  
 139 eius rumpitur quasi agnatione sui heredis. Idem iuris est si cui post factum testamentum uxor in manum conueniat, uel quae in manu fuit nubat: nam eo modo filiae loco esse incipit  
 140 et quasi sua.<sup>1</sup> nec prodest siue haec siue ille qui adoptatus est in eo testamento sit institutus institutaue: nam de exheredatione eius superuacuum uidetur quaerere, cum testamenti

- they remain in the adoptive family, are in the same position as natural children; on emancipation, however, by their adoptive parent they are no longer included amongst his descendants, either by the civil law or by the praetor's edict.
- 137 And thus it comes to pass, conversely, that, so long as they are in the adoptive family, they are reckoned as strangers in relation to their natural parent; if, however, they be emancipated by their adoptive parent, they then begin to be in the same position they would have occupied had they been emancipated by their natural parent.
- 138 If a man after making his testament adopt a son,—either a person who is *sui iuris* by vote of the people, or a *filiusfamilias* by magisterial authority,—his testament is invariably broken  
 139 by this quasi-agnation of a *suus heres*. The result is the same if after making his testament he take a wife *in manum*, or if a woman already in his *manus* become his wife; in either way she begins to hold the position of a daughter and be-  
 140 comes *quasi sua heres*. Nor does it prevent such result that either the wife or the adopted child has been instituted heir in the testament;—it is unnecessary to say anything of their

§ 137. § 4, tit. I. afl., from which the penultimate *emancipati* is supplied.

§§ 138-151. Comp. tit. I. *QVIBVS MODIS TESTAMENTA INFIRMANTVR* (ii, 17).

§ 138. § 1, tit. I. afl. Comp. i, §§ 98 f.; Vlp. xxiii, §§ 2, 3.

§ 139. Comp. i, § 114; Vlp. xxiii, 3.

<sup>1</sup> After *sua* the MS. has an *i*, which Hu. converts into [*heres*] *fit*.

§ 140. Comp. fr. 18, D. *de iniusto rupto* (xxviii, 3).



- faciendi tempore suorum heredum numero non fuerit.  
 141 Filius quoque qui ex prima secundaue mancipatione manu-  
 mittitur, quia reuertitur in potestatem patriam, rumpit ante  
 factum testamentum; nec prodest [*si*] in eo testamento heres  
 142 institutus uel exheredatus fuerit. Simile ius olim fuit in  
 eius persona cuius nomine ex senatusconsulto erroris causa  
 probatur, quia forte ex peregrina uel latina, quae per errorem  
 quasi ciuis Romana uxor ducta esset, natus esset: nam siue  
 heres institutus esset a parente siue exheredatus, siue uiuo  
 patre causa probata siue post mortem eius, omni modo  
 143 quasi agnatione rumpebat testamentum. Nunc uero ex  
 nouo senatusconsulto quod auctore diuo Hadriano factum est,  
 si quidem uiuo patre causa probatur, aequae ut olim omni  
 modo rumpit testamentum; si uero post mortem patris, prae-  
 teritus quidem rumpit testamentum; si uero heres in eo  
 scriptus est uel exheredatus, non rumpit testamentum, ne  
 scilicet diligenter facta testamenta rescinderentur eo tempore  
 144 quo renouari non possent. Posteriore quoque testamento

- disherison, for at the time the testament was made they were  
 141 not of the testator's *sui heredes*. A son also, who is manu-  
 mitted after a first or second mancipation, breaks a previous  
 testament of his father's by reverting into his *potestas*; nor  
 does it matter though in said testament he may have been  
 142 either instituted or disinherited. Formerly the rule was  
 the same in the case of a person on whose account cause of  
 error had been established under the senatusconsult, say be-  
 cause he had been born of a peregrin or latin woman whom  
 his father had married by mistake, believing her to be a  
 citizen; for, whether he had been instituted or disinherited  
 by his parent, and whether the cause of error had been estab-  
 lished before or after his father's death, in any case the testa-  
 143 ment was broken by his quasi-agnation. But now, by a later  
 senatusconsult, due to the late emperor Hadrian, if the cause  
 of error have been established in the father's lifetime the testa-  
 ment is invariably broken just as it used to be; but if cause  
 be not shown till after the father's death, while it will still be  
 broken if the son have been passed over, that will not happen  
 if he has been either instituted in it or disinherited, lest  
 otherwise a carefully executed testament be set aside when  
 144 it is no longer possible to re-make it. An earlier testa-

§ 141. Comp. i, § 132; Vlp. xxiii, 3.

§ 144. § 2, tit. I. afd. Comp. Vlp.

§ 142. Comp. i, §§ 67-74.

xxiii, 2.



quod iure factum est superius rumpitur; nec interest an extiterit aliquis ex eo heres an non extiterit: hoc enim solum spectatur an existere potuerit. ideoque si quis ex posteriore testamento quod iure factum est aut noluerit heres esse, aut uiuo testatore aut post mortem eius antequam hereditatem adiret decesserit, aut per cretionem exclusus fuerit,<sup>1</sup> aut condicione sub qua heres institutus est defectus sit, aut propter caelibatum ex lege Iulia summotus fuerit ab hereditate:<sup>2</sup> quibus casibus paterfamilias intestatus moritur: nam et prius testamentum non ualet, ruptum a posteriore, et posterius aequae nullas uires habet, cum ex eo nemo heres extiterit. 145 Alio quoque modo testamenta iure facta infirmantur, uelut [*cum*] is qui fecerit testamentum capite deminutus sit; quod quibus modis accadat primo commentario<sup>1</sup> relatum est. 146 hoc autem casu inrita fieri testamenta dicemus, cum alioquin et quae rumpuntur inrita fiant, [*et quae statim ab initio non iure fiunt inrita sint; sed et ea quae iure facta sunt et postea propter*

ment is also broken by a later one duly executed. And it is immaterial whether any one has become heir under the second one or not; the sole question is, could there have been an heir under it? Therefore if the heir under a later testament, made according to the requirements of law, either has declined the inheritance, or has predeceased the testator, or, having survived him, has died before entry, or has been excluded by cretion or through failure of a condition upon which his institution depended, or has been debarred by the Julian law on account of celibacy,—in any of those cases the party dies intestate; for his earlier testament is invalid, having been broken by the later one, and this is equally of no 145 avail since no one becomes heir in terms of it. There is yet another way in which a testament duly executed may be annulled, namely by the testator's *capitis deminutio*; and how this may occur has been explained in our first Com- 146 mentary. But in this case we say it is irritated, [*i.e. becomes untenable.*] No doubt those which are broken become untenable, as *are those also that at the first were not executed according to law; while, on the other hand, those that were originally made in due form, but have subsequently been*

<sup>1</sup> Comp. §§ 166 f.<sup>2</sup> Comp. §§ 111, 286; Vlp. xxii, 4.  
§ 145. § 4, tit. I. afd. Comp. Vlp.  
xxiii, 4.<sup>1</sup> Comp. i, §§ 159-162.

§ 146. § 5, tit. I. afd., from which the words in italics, omitted in the ms., are borrowed.

[*capitis deminutionem irrita fiunt*,] possunt nihilominus rupta dici: sed quia sane commodius erat singulas causas singulis appellationibus distingui, ideo quaedam non iure fieri dicuntur, quaedam iure facta rumpi uel irrita fieri.

- 147 Non tamen per omnia inutilia sunt ea testamenta quae uel ab initio non iure facta sunt uel iure facta postea irrita facta aut rupta sunt: nam si septem testium signis signata sint testamenta, potest scriptus heres secundum tabulas bonorum possessionem petere, si modo defunctus testator et ciuis Romanus et suae potestatis mortis tempore fuerit: nam si ideo irritum factum sit testamentum quod puta ciuitatem uel etiam libertatem testator amisit, aut quod is in adoptionem se dedit et mortis tempore in adoptiui patris potestate fuit, non potest scriptus heres secundum tabulas bonorum possessionem
- 148 petere. [*Qui igitur*]<sup>1</sup> secundum tabulas testamenti quae aut statim ab initio non iure factae sunt, aut iure factae postea ruptae uel irritae [*factae*]<sup>2</sup> erunt, bonorum posses-

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*rendered untenable by capitis deminutio*, may none the less be said to be broken. But as it is obviously more convenient to distinguish particular cases by particular names, we say of some testaments that they have not been executed according to law, and of others that have been duly executed that they are either broken or irritated.

- 147 Those testaments, however, are not altogether useless that either have not at first been executed according to law, or, having been so executed, have afterwards been irritated or broken. For if a testament be sealed with the seals of seven witnesses, the heir named in it may apply for possession of the defunct's estate in terms of the writing, provided the testator was a citizen and *sui iuris* at the moment of his death; but such application is incompetent if the testament have been irritated say by the testator's loss of citizenship or liberty, or by his having given himself in adoption and having continued till his death in the *potestas* of his adoptive
- 148 father. Those who have a grant of possession of a defunct's estate in terms of a testament that was either from the first not executed according to law, or that, having been duly executed, has afterwards been broken or irritated, will have

§ 147. § 6, tit. I. afd. Comp. § 119, and note 1; Vlp. xxiii, 6; xxviii, §§ 5, 6.

§ 148. Comp. iii, §§ 35-38; Vlp. xxiii, 6; xxviii, 13.

<sup>1</sup> Supplied by K. u. S.; P. supplies *sed si qui*, and Hu. *si qui*.

<sup>2</sup> So P.; K. u. S., following the ms., have simply *erunt*; Hu. [*factae*] *sunt*.

sionem accipiunt, si modo possunt hereditatem obtinere, habebunt bonorum possessionem cum re; si uero ab iis auocari hereditas potest, habebunt bonorum possessionem sine re. Nam si quis heres iure ciuili institutus sit,<sup>1</sup> uel ab intestato iure legitimo heres sit, is potest ab iis hereditatem auocare; si uero nemo sit alius iure ciuili heres, ipsi retinere hereditatem possunt; *nec ullum ius aduersus eos habent* — — — *legitimo iure deficiuntur.* — — — — — *quoque notauimus,* etiam legitimis quoque (*heredibus*) potiores scripti habentur, — — — — — factum sit testamentum quod familia non uenierit aut nuncupationis uerba testator locutus non sit; *cum enim agnati petant hereditatem,* — — — — — .<sup>2</sup>

*bonorum possessio cum re*, [real and effectual possession], if only they can retain the inheritance; but if it can be taken past them, their grant of possession will be *sine re*, [without real effect]. For if an individual have been instituted heir [in an earlier testament executed] according to the requirements of the civil law, or be heir-at-law *ab intestato*, he is in a position to deprive them of the inheritance; but if there be no other person that is heir by the civil law, they can retain it; for [*cognates and other persons*] not enjoying the character of heirs under the civil law have no right in preference to them. [Sometimes, however, as] we have already observed, the heirs instituted in the invalid testament are preferred even to the heirs-at-law, [as when the objection to the regularity of its execution is merely] that the testator had not duly mancipated his *familia* or expressed the words of nuncupation; if in such a case the agnates claim the inheritance, [they may, according to a constitution of our emperor Antonine's, be defeated by ex-

§§ 149-151. P. 92 of the ms., which contains the greater part of these pars., is to a considerable extent illegible; while of much that Stud. has reproduced he does not profess himself certain.

§ 149. Comp. §§ 119-121.

<sup>1</sup> After *sit* the ms. has *uel ex primo uel ex posteriore testamento*: these words I have expunged as an inaccurate gloss; for if there were a valid later testament there could not well be any claim under an earlier invalid one, § 144.

<sup>2</sup> The par. may, I think, be completed as follows: *nec ullum ius aduersus eos habent cognati quique*

*legitimo iure deficiuntur. Aliquando tamen, ut supra quoque notauimus, etiam legitimis quoque heredibus potiores scripti habentur, ueluti si ideo non iure factum sit testamentum quod familia non uenierit aut nuncupationis uerba testator locutus non sit; cum enim agnati petant hereditatem per exceptionem doli mali ex constitutione imperatoris Antonini (§ 120) summoneri possunt.*

The meaning I take to be this: a grant of *bonor. possessio* to a person instituted in an invalid will was, under the limitations mentioned in § 147, effectual (*cum re*) as against a cognate or other merely praetorian

150 — — — — — lege bona caduca fiunt et ad populum deferri iubentur si defuncto nemo — — — — .

151 Potest ut iure facta testamenta *contraria* (*uoluntate*) infirmantur. Apparet [*autem*] non posse (*ex eo solo infirmari*) testamentum (*quod postea*) testator (*id noluerit*) ualere, usque adeo ut si linum eius inciderit nihilo minus iure ciuili ualeat. quin *etiam si deleuerit quoque aut obleuerit* tabulas testamenti, *non ideo protinus*<sup>1</sup> *desinent ualere quae fuerant scripta, licet eorum probatio difficilis sit.* quid ergo est si quis ab intestato bonorum possessionem petierit, *et is qui ex eo testamento*

150 [*ception of fraud.* Nor does the Julian law take away the [*inheritance from those named in the invalid testament if they have obtained bonorum possessio under the edict; for by [that] enactment the estate of a person deceased becomes caduciary and falls to the state only [when he has no heir either civil or praetorian].*

151 It is possible even for a duly executed testament to be invalidated by a contrary manifestation of will. It appears, however, that it is not enough to invalidate it that the testator has afterwards meant it to be of no effect; so little is this the case that even if he have cut the strings that secured it, still it is valid by the civil law; nay, even if he have deleted some part of it, what was there written does not *straightway* cease to be valid, although the proof of it may be troublesome. But what if some one claim *bonorum possessio* as by right of intestacy, and he who under the testament is entitled to the

successor claiming *ab intestato*. As against persons claiming under an earlier and valid testament, or *ab intestato* as heirs of the *ius ciuile* (*sui*, agnates, and patrons), it was, as a rule, ineffectual (*sine re*); but, as against agnates at least, it was effectual if the ground of invalidity was nothing more serious than omission of the *mancipatio* or *uerba nunciationis*.

The reconstructions of K. u. S. and Hu. proceed on a somewhat different track, and seem to me hardly reconcilable with the doctrine of § 120.

§ 150. The only legible words, besides those in the text, are *Iulia* on line 10, and *possessores* on line 11. K. ingeniously conjectures: *Sane lege Iulia scriptis non auferitur hereditas si bonorum possessores ex*

*edicto constituti sint. nam ita demum ea lege bona caduca fiunt et ad populum deferri iubentur, si defuncto nemo heres uel bonorum possessor exstat.* Comp. Vlp. xxviii, 7, last clause. The Julian law referred to is the L. Iulia et Papia Poppaea (i, § 145, note 1), whose caduciary provisions were often spoken of under the name of *Lex caducaria*. Comp. generally on subject of *caduca*, Vlp. xvii, §§ 1-3.

§ 151. This par. occupies the last ten lines of p. 92, to a considerable extent illegible, and the first two of p. 93. Comp. § 7, tit. I. *afd.*, from which the words in ital. in the second and third lines are supplied.

<sup>1</sup> So P.; the ms. seems to have *non ideo minus*, for which Hu. substitutes *non ideo magis*, and K. u. S. *nihilo minus non*.



*heres est petat hereditatem?* — — — — — perueniat hereditas:<sup>2</sup> et hoc ita rescripto imperatoris Antonini significatur.

- 152 Heredes autem aut necessarii dicuntur aut sui et necessarii  
 153 aut extranei. Necessarius heres est seruus cum libertate  
 heres institutus; ideo sic appellatus quia siue uelit siue nolit  
 omni modo post mortem testatoris protinus liber et heres est.  
 154 Vnde qui facultates suas suspectas habet, solet seruum suum  
 primo aut secundo uel etiam ulteriore gradu<sup>1</sup> liberum et  
 heredem instituere, ut si creditoribus satis non fiat potius  
 huius heredis quam ipsius testatorius bona ueneant,<sup>2</sup> id est ut  
 ignominia quae accidit ex uenditione bonorum hunc potius

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inheritance raise his *hereditatis petitio*? [The latter may in  
 [that case be displaced by exception of fraud, and the inherit-  
 [ance thus be prevented from falling to one whom, according to  
 [the last manifestation of his will, the testator did not mean  
 [to be his heir]; such is the rule laid down by our emperor  
 Antonine in one of his rescripts.

- 152 Heirs are called either *necessarii*, or *sui et necessarii*, or  
 153 *extranei*. A necessary heir is a slave instituted with gift  
 of freedom; so called because in every case, whether he will  
 or not, he straightway on the testator's death becomes free and  
 154 heir. Accordingly it is not unusual for a man who has  
 doubts about his solvency to institute one of his slaves as  
 free and heir in the first or second place, or even in a lower  
 one; so that, if the creditors cannot be paid in full, the de-  
 ceased's estate may be sold rather as that of the heir thus  
 instituted than of the testator himself, and the consequent

<sup>2</sup> Hu., who, like K. u. S., makes the question begin and end with *quid ergo est*, reconstructs thus: *Potest eum per exceptionem doli mali repellere, si modo ea mens testatoris fuisse probetur, ut ad eos qui ab intestato uocantur perueniat hereditas*. K. (in K. u. S., and modifying somewhat his previous reconstruction in his *Krit. Vers.*, p. 13) proposes: *Per exceptionem doli mali repellitur; si uero nemo ab intestato bonorum possessionem petierit, fiscus scripto heredi quasi indigno auferat hereditatem, ne ullo modo ad eum quem testator heredem habere noluit perueniat hereditas*. There does not seem room for all

this on the two lines (23 and 24) appropriate to it. I prefer: *Potest scriptus heres per exceptionem doli mali repelli, ne ad illum qui non habet uoluntatem defuncti perueniat hereditas*. As authority see ii, 198; Vlp. in fr. 1, § 8, D. *si tab. test. null. extab.* (xxxviii, 6), and in fr. 4, § 10, D. *de dol. mal. exc.* (xlv, 4).

§§ 152-173. Comp. tit. I. *DE HEREDVM QUALITATE ET DIFFERENTIA* (ii, 19). A vacant line in the ms., probably for a rubric, before § 152.

§ 152. Pr. tit. I. *afd.*

§ 153. § 1, tit. I. *afd.*

§ 154. § 1, tit. I. *afd.* Comp. i, 21.

<sup>1</sup> See § 174.

<sup>2</sup> Comp. iii, 79.

heredem quam ipsum testatorem contingat; quamquam apud Fufidium<sup>3</sup> Sabino<sup>4</sup> placeat eximendum eum esse ignominia,<sup>5</sup> quia non suo uitio sed necessitate iuris bonorum uenditionem  
 155 pateretur; sed alio iure utimur. Pro hoc tamen incommodo illud ei commodum praestatur, ut ea quae post mortem patroni sibi adquisierit, siue ante bonorum uenditionem siue postea, ipsi reseruentur; et quamuis *pro portione*<sup>1</sup> bona uenierint iterum ex hereditaria causa bona eius non uenient, nisi si quid ei ex hereditaria causa fuerit adquisitum, uelut si latinum adquisierit<sup>2</sup> [*et*] locupletior factus sit; cum ceterorum hominum quorum bona uenierint pro portione, si quid postea  
 156 adquirant, etiam saepius eorum bona uenire solent.<sup>3</sup> Sui autem et necessarii heredes sunt uelut filius filiaue; nepos

disgrace attach to the former rather than to the latter. Sabinus, according to Fufidius, was of opinion that the slave should be exempt from ignominy, since he had to submit to the sale not from any fault of his own but as a legal neces-  
 155 sity; but the law is otherwise. In return, however, for that drawback he enjoys this advantage,—that he is entitled to retain what he himself has acquired after the death of his patron, whether before or after the sale; and although the sale of the estate may have yielded the creditors only a percentage on their claims, yet his goods will not be sold a second time on account of hereditary debts, unless it be things acquired by him from a hereditary source, such as the estate of a deceased latin [freedman of the testator's] that has fallen in to him and left him a profit; whereas when the goods of other insolvents are brought to sale and yield only a percentage, their subsequent acquisitions may be sold again and again  
 156 [until the creditors have been paid in full]. Heirs *sui et necessarii* are such as a son or daughter, a grandson or grand-

<sup>3</sup> A jurist of whom little is known, but mentioned by Africanus (fr. 5, D. de auro, xxxiv, 2) as the author of some books of 'Questions.'

<sup>4</sup> See i, § 196, note 1.

<sup>5</sup> Comp. Cic. p. Quint. xv, §§ 49, 50; lex Iulia municip. cap. 25 (Bruns, p. 97); l. 3, C. Th. de inoff. test. (ii, 19). Comp. also pr. I. de succ. sublat. (iii, 12); Th. iii, 21, pr. § 155. Comp. § 1, tit. I. afd.

<sup>1</sup> The ms. has *propter contractionem*; Heise's emendation is unanimously accepted.

<sup>2</sup> The ms. runs—*si latinus ad-*

*quisierit locupletior factus sit*. Various emendations have been proposed; that in the text is due to Gou., and justified by Gai. ii, 195. As Gou. observes, *latinum adquirere* is the same thing as *latini liberti mortui bona adquirere*. Comp. iii, 58; Plin. Ep. x, 105, (*ius latinorum suorum mihi reliquit*.)

<sup>3</sup> Cp. fr. 7, D. de cess. bon. (xlii, 3). §§ 156-158. § 2, tit. I. afd., from which the words in italics are borrowed. Comp. § 123, note; iii, §§ 2 f.; Paul. in fr. 11, D. de lib. et post. (xxviii, 2); Vlp. xxii, 24.

- neptisue ex filio, [et] deinceps *ceteri* qui modo in potestate morientis fuerunt: sed uti nepos neptisue suus heres sit non sufficit eum in potestate aui mortis tempore fuisse, sed opus est ut pater quoque eius uiuo patre suo desierit suus heres esse, aut morte interceptus aut qualibet ratione liberatus potestate; tum enim nepos neptisue in locum sui patris  
 157 succedunt. Sed sui quidem heredes ideo appellantur quia domestici heredes sunt et uiuo quoque parente quodammodo domini existimantur; unde etiam si quis intestatus mortuus sit, prima causa est in successione liberorum. necessarii uero ideo dicuntur quia omni modo, [siue] uelint [si]ue [nolint],  
 158 [tam] ab intestato quam ex testamento heredes fiunt. sed his praetor permittit abstinere se ab hereditate, ut potius  
 159 parentis bona ueneant. idem iuris est et in uxoris persona quae in manu est, quia filiae loco est, et in nuru quae in  
 160 manu filii est, quia neptis loco est. quin etiam similiter abstinendi potestatem facit praetor etiam ei qui in causa mancipii est <sup>1</sup> [si] cum libertate heres institutus sit, quam-

- daughter by a son, and so on, who were *in potestate* of the deceased when dying. But to make a grandchild a *suus heres* it is not enough that he was in the *potestas* of his grandfather at the time of his death,—it is also necessary that his father should have ceased to be *suus* in the grandfather's lifetime, having either been cut off by death or for some reason released from the *potestas*; for then the grandson or granddaughter  
 157 steps into the place of their father. They are called *sui heredes* because they are heirs of the house, and even in their parents' lifetime are regarded as in a manner owners [of the family estate]; wherefore, if any one die intestate, the first place in the succession belongs to his children. And they are called *necessarii*, because in every case, as well on intestacy as under a testament, they become heirs *whether they will or*  
 158 *not*. But the praetor allows them to abstain from the inheritance, that so the estate [if insolvent] may rather be sold  
 159 in name of their [deceased] parent. The rule is the same as regards a wife *in manu*, for she is in the position of a daughter, and of a daughter-in-law *in manu* of a son, for she is in the  
 160 position of a granddaughter. Nay, the same power of abstaining is conceded by the praetor even to a person *in causa mancipii* who has been instituted heir with freedom; and this

§ 159. Comp. iii, 3; i, 111; ii, 139.

§ 160. Comp. i, §§ 123, 138; iii, 114.

<sup>1</sup> The ms. adds *id est mancipato*: omitted as obviously a gloss.

- uis*<sup>2</sup> necessarius, non etiam suus heres sit, tamquam seruus.
- 161 Ceteri qui testatoris iuri subiecti non sunt extranei heredes appellantur: itaque liberi quoque nostri qui in potestate nostra non sunt heredes a nobis instituti [sicut]<sup>1</sup> extranei uidentur; qua de causa et qui a matre heredes instituuntur eodem numero sunt, quia feminae liberos in potestate non habent.<sup>2</sup> serui quoque qui cum libertate heredes instituti sunt et postea a domino manumissi<sup>3</sup> eodem numero habentur.
- 162 Extraneis autem heredibus deliberandi potestas data est de
- 163 adeunda hereditate uel non adeunda. Sed siue is cui abstinendi potestas est inmiscuerit se bonis hereditariis, siue is cui de adeunda [*hereditate*] deliberare licet adierit, postea relinquendae hereditatis facultatem non habet nisi si minor sit annorum xxv: nam huius aetatis hominibus, sicut in ceteris omnibus causis deceptis, ita etiam si temere damnosam hereditatem susceperint praetor succurrit. scio quidem diuum Hadrianum etiam maiori xxv annorum ueniam dedisse, cum

- although he is only a necessary heir, like a slave, and not a
- 161 *suius*. Other heirs, who are not subject to the testator's right, are called *extranei*, stranger-heirs. Those of our children, therefore, who are not in our *potestas*, if we institute them, are regarded as strangers; and for the same reason so are those instituted heirs by their mother, seeing women do not have their children *in potestate*. Slaves also, who have been instituted heirs with liberty, but afterwards manumitted by their owner,
- 162 belong to the same class. To such stranger-heirs there is given a power of deliberating whether or not they will enter
- 163 upon an inheritance. But if an heir who has the right of abstaining have once intromitted with hereditary effects, or one who is entitled to deliberate as to entering have once entered, he has not the power of afterwards relinquishing the inheritance, unless he be under twenty-five years of age; for, as the praetor grants relief to men of this age in every other case in which they have been taken advantage of, so does he when they have accepted a detrimental inheritance. I am aware, however, that the late emperor Hadrian once granted the same relief to an individual above twenty-five, on his dis-

<sup>2</sup> So K. u. S. and Hu., correcting the ms., which has *cum*.

§ 161. § 3, tit. I. afd. Comp. Vlp. xxii, 25.

<sup>1</sup> According to M., a gloss.

<sup>2</sup> Comp. i, 104; Vlp. xxvi, 7.

<sup>3</sup> Comp. § 188.

§§ 162, 163. § 5, tit. I. afd. Comp. Paul. iii, 4b, § 11.



post aditam hereditatem grande aes alienum, quod aditae hereditatis tempore latebat, apparuisset.

- 164 Extraneis heredibus solet cretio dari, id est finis deliberandi, ut intra certum tempus uel adeant hereditatem, uel si non adeant temporis fine summoueantur: ideo autem cretio appellata est quia cernere est quasi decernere et constituere.
- 165 Cum ergo ita scriptum sit: HERES TITIVS ESTO, adicere debemus: CERNITOQVE IN CENTVM DIEBVX PROXIMIS QVIBVX SCIES POTERISQVE. QVODNI ITA CREVERIS, EXHERES ESTO.
- 166 Et qui ita heres institutus est, si uelit heres esse, debebit intra diem cretionis cernere, id est haec uerba dicere: QVOD ME PVBLIVS MEVIVS TESTAMENTO SVO HEREDEM INSTITVIT, EAM HEREDITATEM ADEO CERNOQVE; quodsi ita non creuerit, finito tempore cretionis excluditur: nec quicquam proficit si pro herede gerat, id est si rebus hereditariis tamquam heres
- 167 utatur. At is qui sine cretione heres institutus est, aut

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covery after entry of the existence of a debt of large amount which was latent when that step was taken.

- 164 To stranger-heirs it is the practice to prescribe cretion, that is a term for deliberating, so that they must either enter within the time fixed, or, on its expiry without their having entered, be displaced; it is so called because *cernere* means to decide and
- 165 determine. When therefore we have written, 'Titius be my heir,' we ought to add these words: 'and cern within the next hundred days in which you know and can; in default, be dis-
- 166 inherited.' If the individual so instituted desire to be heir, he must cern within the time for cretion, that is, announce his resolution in these words: 'Whereas Publius Mevius has instituted me heir in his testament, I enter upon and cern to his inheritance.' If he have not cerned in this way, he is debarred when the cretionary term is ended; nor does it avail him anything that he is behaving as heir, that is, dealing with the items of the inheritance as if he were heir.
- 167 But he who is instituted heir without cretion, or called to the

§ 164. Comp. Vlp. xxii, 27; Varro *de L. L.* vii, 98 (Bruns, p. 281). The *cretio* here described was no longer used in the Justinianian law.

§ 165. Comp. §§ 171, 177; Vlp. xxii, 27. The cretion was perfect or imperfect according as it was or was not under pain of disherison; Vlp. xxii, 34.

§ 166. Comp. Vlp. xxii, §§ 25, 26, 28; § 7, tit. I. *afd.* It would appear that the cerniture was declared in the presence of witnesses convoked for the purpose. Comp. Cic. *ad Att.* xiii, 46, § 2, and Varro *de L. L.* vi, 81 (Bruns, p. 278).

§ 167. Comp. iii, 87; Vlp. xxii, 25; § 7, tit. I. *afd.*

- qui ab intestato legitimo iure ad hereditatem uocatur, potest aut cernendo aut pro herede gerendo uel etiam nuda uoluntate suscipiendae hereditatis heres fieri : eique liberum est quocumque tempore uoluerit adire hereditatem ; sed solet praetor postulantibus hereditariis creditoribus tempus constituere intra quod si uelit adeat hereditatem, si minus, ut
- 168 liceat creditoribus bona defuncti uendere. *Sicut* autem [qui] cum cretione heres institutus est nisi creuerit hereditatem non fit heres, ita non aliter excluditur quam si non creuerit intra id tempus quo cretio finita sit ; itaque licet ante diem cretionis constituerit hereditatem non adire, tamen paenitentia actus superante die cretionis cernendo heres esse
- 169 potest. At is qui sine cretione heres institutus est, quiue ab intestato per legem uocatur, sicut uoluntate nuda heres fit, ita et contraria destinatione statim ab hereditate repellitur.
- 170 Omnis autem cretio certo tempore constringitur. in quam rem tolerabile tempus uisum est centum dierum : potest tamen nihilo minus iure ciuili aut longius aut breuius tempus

- 
- inheritance *ab intestato* by devolution of law, may become heir either by cerning or by behaving as heir, or even by an informal expression of his intention to take up the inheritance, and it is free to him to enter to it at any time he chooses ; but it is the practice for the praetor, on the petition of the creditors of the deceased, to fix a time within which the heir must enter, if such be his pleasure, or the creditors be entitled, if he do not, to sell the deceased's estate.
- 168 But just as an heir instituted without cretion does not become heir unless he has cerned, so he is not otherwise excluded than by failure to cern before the cretionary term has expired ; therefore though, before the last day of cretion, he may have resolved not to enter upon the inheritance, yet, repenting of his resolution, he may still become heir by cerniture while
- 169 any part of the term remains. He, on the other hand, who is instituted heir without cretion, or who is called by law on intestacy, as he becomes heir by any informal declaration of will, is likewise at once excluded from the inheritance by any
- 170 declaration to the contrary. Every cretion is limited to a certain time. A hundred days have been considered a reasonable allowance, although by the civil law either a longer or a

§ 168. Comp. Vlp. xxii, 30.

§ 169. Comp. Vlp. xxii, 29 ; § 7, tit. I. afd.

§ 170. Comp. Cic. *ad Att.* xiii, 46, § 2 ; *Testamentum Dasumii*, p. C. 109, (Bruns, p. 202).

- 171 dari; longius tamen interdum praetor coartat. Et quamvis omnis cretio certis diebus constringatur, tamen alia cretio vulgaris uocatur, alia certorum dierum: vulgaris illa quam supra exposuimus, id est in qua adiciuntur haec uerba: QVIBVS SCIET POTERITQVE: certorum dierum, in qua detractis his uerbis
- 172 cetera scribuntur. Quarum cretionum magna differentia est: nam uulgari cretione data nulli dies computantur nisi quibus scierit quisque se heredem esse institutum et possit cernere; certorum uero dierum cretione data, etiam nescienti se heredem institutum esse numerantur dies continui; item ei quoque qui aliqua ex causa cernere prohibetur, et eo amplius ei qui sub condicione heres institutus est, tempus numeratur; unde
- 173 melius et aptius est uulgari cretione uti. [Continua haec cretio uocatur quia continui dies numerantur; sed quia *tam*<sup>1</sup> dura est haec cretio altera *magis in usu*<sup>2</sup> habetur; unde etiam uulgaris dicta est.]

- shorter period may be granted; but a longer one is sometimes abridged by the praetor. And although every cretion is under a certain limitation of time, yet one variety is called ordinary cretion, and another determinate; the first is that we have been describing, and in which there are contained in the cretion-clause the words, 'in which he knows and can;' the second occurs when we have the cretion-clause without
- 172 those words. There is a great difference between the two; for where ordinary cretion is enjoined, no days are counted but those during which the party knows that he has been instituted heir, and is in a position to cern; whereas where the cretion is determinate, the days are reckoned continuously, even against a party who is not aware that he has been instituted heir, against him who from any cause is prevented cerning, and against him who is instituted only conditionally. It is better and fitter therefore to employ the ordinary cretion.
- 173 The determinate cretion is [also] called continuous, because the days are reckoned continuously; but, as it is so strict, the other is more frequently employed, and therefore called ordinary.

§§ 171, 172. Comp. Cic. *ad Att.* xi, 12, § 41; *de orat.* i, 22, § 101; Vlp. xxii, §§ 31, 32.

§ 173. This par. looks like a gloss; it is little more than an amplification, somewhat clumsy, of the final words of the preceding one.

<sup>1</sup> The ms. has *tm*, which usually stands for *tamen*; K. u. S. so print it, while P. has *tam*, and Hu. omits the word altogether.

<sup>2</sup> The ms. has *minus*; intended possibly, as G. suggests, for *mgin-usu*.

- 174 Interdum duos pluresue gradus heredum facimus, hoc modo :  
 LVCIVS TITIVS HERES ESTO, CERNITOQVE IN DIEBV[S] [CENTVM]  
 PROXIMIS QVIBVS SCIES POTERISQVE. QVODNI ITA CREVERIS,  
 EXHERES ESTO. TVM MEVIVS HERES ESTO, CERNITOQVE IN  
 DIEBV[S] CENTVM et reliqua; et deinceps in quantum uelimus  
 175 substituere possumus. Et licet nobis uel unum in unius  
 locum substituere pluresue, et contra in plurium locum uel  
 176 unum uel plures substituere. Primo itaque gradu scriptus  
 heres hereditatem cernendo fit heres et substitutus excluditur;  
 non cernendo summouetur, etiamsi pro herede gerat, et in  
 locum eius substitutus succedit; et deinceps si plures gradus  
 177 sint in singulis simili ratione idem contingit. Sed si cretio  
 sine exheredatione sit data, id est in haec uerba : SI NON  
 CREVERIS TVM PVBLIVS MEVIVS HERES ESTO, illud diuersum  
 inuenitur, quod si prior ommissa cretione pro herede gerat, sub-  
 stitutum in partem admittit, et fiunt ambo aequis partibus  
 heredes; quodsi neque cernat neque pro herede gerat, tum sane

- 174 Sometimes we make two or more degrees of heirs, thus :  
 ‘Lucius Titius be my heir, and cern within the next hundred  
 days in which you know and can; if you have not cerned,  
 be disinherited: in that case Mevius be my heir, and cern  
 within a hundred days,’ and so on; and we may substitute  
 175 successively to any extent we like. And we may substi-  
 tute either one person or several in the place of one; or, on  
 the other hand, either one or several in the place of several.  
 176 The party, therefore, who is named heir in the first degree,  
 becomes heir by cerniture, and the substitute is excluded; by  
 not cerning, the former is displaced, even though he behave as  
 heir, and the substitute succeeds in his stead; and if there be  
 several degrees the same rules apply to each of them in suc-  
 177 cession. But if cretion be enjoined without disherison,  
 that is to say in such words as ‘if you do not cern, then  
 Publius Mevius be heir,’ the rule is different; because if  
 the institute-heir has neglected to cern, yet has behaved as  
 heir, the substitute is admitted *pro parte*, and both become  
 heirs for a moiety. If, however, the institute neither cern nor

§§ 174-178. Comp. tit. I. DE VVLGARI  
 SVBSTITVTIONE (ii, 15). In the MS.  
 those pars. are introduced with the  
 rubric *de substitutionibus*, apparently  
 by the original hand.

§ 174. . Comp. Vlp. xxii, 33; pr. tit. I. afd.

§ 175. Comp. § 1, tit. I. afd.

§ 176. Comp. § 166.

§§ 177, 178. Comp. Vlp. xxii, 34, from  
 which it appears that the rule was  
 modified by Marc. Aurelius, and  
*gestio pro herede* by the institute  
 held sufficient to altogether exclude  
 the substitute.



- in uniuerso summouetur et substitutus in totam hereditatem  
 178 succedit. Sed Sabino quod  
 eo modo heres fieri possit institutus in totam hereditatem  
 non tamen admitti substitutus placuit, quamdiu cernere et  
 tum pro herede gerentem, etiamsi pro herede gesserit,  
 placuit etiam superantutur; cum uero cretio finita sit,  
 in partem substitutus admitti substitutum: <sup>1</sup> aliis <sup>2</sup> uero  
 reuerti non posse. et cretione eum <sup>3</sup> pro herede gerendo  
 179 Liberis nostris institui admittere et amplius ad cretionem  
 solum ita ut supra  
 heredes non extiterint, quibus quos in potestate habemus non  
 ut etiamsi heredes diximus substituere possumus, id est ut si  
 fuerint, sit iis heres alius nobis heres sit; sed eo amplius  
 MEVS MIHI HERES nobis extiterint et adhuc inpueres mortui  
 (SIVE HERES) aliquis heres, uelut hoc modo: TITIVS FILIVS  
 HERES ESTO. SI FILIVS MEVS MIHI (HERES NON ERIT,  
 ERIT ET PRIVS MORIATVR QVAM IN SVAM TVTE-

behave as

- 178 and the  
 was the heir, then undoubtedly he is altogether displaced,  
 it in his substitute succeeds to the whole inheritance. It  
 room, opinion of Sabinus that, so long as the institute had  
 have power to cern and thus become heir, there was no  
 periculum for the substitute, even though he, the institute, might  
 tutum, been behaving as heir; and that it was only after the  
 w. of cretion had expired that, notwithstanding the insti-  
 tute's gestio pro herede, the substitute was admitted. But it  
 as held by the lawyers of the other school that if the insti-  
 1 tute, while his time for cretion was still running, chose to act  
 as heir, he thereby let in the substitute for a share, and could  
 not afterwards fall back on his cretion.

- 179 To our impuberate descendants in potestate we may not only  
 make a substitution in the manner already described, that is  
 to say by providing that, if they do not become heirs, another  
 person shall be our heir instead of them,—but we may also  
 appoint some one to be their heir in the event of their having  
 become our heirs, but died in pupillarity; as, for example,  
 thus: ‘Be my son Titius my heir; if he do not become my  
 heir, or if, having done so, he die before passing into his own

<sup>1</sup> This appears to be the reading of the ms., and is approved by P. and K. u. S.; Hu. renders it—*tum pro herede gerentem admittere substitutum*.

<sup>2</sup> See i, 196, note 1.

<sup>3</sup> Before this word the ms. has

*posse*, deleted as suggested by K. (K. u. S. footnote).

§§ 179–184. Comp. tit. I. DE PVPILLARI SVBSTITVTIONE (ii, 16).

§ 179. Pr. tit. I. afd., from which the words in ital. are borrowed. Comp. Vlp. xxiii. 7.

- 180 LAM VENERIT, *TVNC* SEIVS HERES ESTO. quo casu si quidem non extiterit heres filius, substitutus patri fit heres; (*si uero*)<sup>1</sup> heres extiterit filius et ante pubertatem decesserit, ipsi filio fit heres substitutus. quam ob rem duo quodammodo sunt testamenta, aliud patris aliud filii, tamquam si ipse filius sibi heredem instituisset; aut certe unum
- 181 est testamentum duarum hereditatum. Ceterum ne post obitum parentis periculo insidiarum subiectus uideatur pupillus, in usu est uulgarem quidem substitutionem palam facere, id est eo loco quo pupillum heredem instituimus. uulgaris substitutio ita uocat ad hereditatem substitutum si omnino pupillus heres non extiterit; quod accidit cum uiuo parente moritur, quo casu nullum substituti maleficium suspicari possumus, cum scilicet uiuo testatore omnia quae in testamento scripta sint ignorentur: illam autem substitutionem per quam, *etiamsi* heres extiterit pupillus et intra pubertatem decesserit, substitutum uocamus, separatim in inferioribus tabulis scribimus, easque tabulas proprio lino propriaque cera consignamus, et in prioribus tabulis cauemus ne

- 180 tutelage, then be Seius my heir.' In this case, if the son has not become his father's heir, the substitute takes that position; if, however, the son have become heir, but died in pupillarity, the substitute becomes the son's heir, [not the father's.] There are thus in a manner two testaments,—one the father's, the other the son's, just as if the latter had instituted an heir for himself; or at any rate there is one testament disposing
- 181 of two inheritances. But lest the pupil after his parent's death should be exposed to the risk of foul play, it is usual to make the ordinary substitution openly, *i.e.* in that part of the testament which contains the institution of the pupil as heir. By the ordinary substitution the substitute is called to the inheritance only in the event of the pupil not having become heir at all; this happens when he predeceases his parent; and until then we cannot suspect any misconduct on the part of the substitute, seeing that so long as the testator lives the contents of his testament are unknown. But the substitution whereby we appoint a substitute in the event of the pupil having become heir but died before reaching puberty we insert by itself in the later tablets, which we tie up and seal with

§ 180. Pr. § 2, tit. I. afd.

the ms.

<sup>1</sup> From the Inst., but hardly sufficient to fill the illegible space in

§ 181. Comp. Epit. ii, 4, § 2; § 3, tit. I. afd.; Th. ii, 16, 3.

inferiores tabulae uiuo filio et adhuc inpubere aperiantur. sed longe tutius est utrumque genus substitutionis [separatim]<sup>1</sup> in inferioribus tabulis consignari; quod, si ita [consignatae uel]<sup>1</sup> separatæ fuerint substitutiones ut diximus, ex priore potest  
 182 intelligi in altera quoque<sup>2</sup> idem esse substitutus. Non solum autem heredibus institutis inpuberibus liberis ita substituere possumus, ut si ante pubertatem mortui fuerint sit is heres quem nos uoluerimus, sed etiam exheredatis: itaque eo casu si quid pupillo ex hereditatibus legatisue aut donationibus propinquorum acquisitum fuerit, id omne ad substitutum  
 183 pertinet. Quaecumque diximus de substitutione inpuberum liberorum, uel heredum institutorum uel exheredatorum,  
 184 eadem etiam de postumis<sup>1</sup> intellegemus. Extraneo uero heredi<sup>1</sup> instituto ita substituere non possumus ut si heres extiterit et intra aliquod tempus decesserit alius ei heres sit; sed hoc solum nobis permissum est, ut eum per fideicommis-

cord and seals of their own; and in the earlier ones we give instructions that the others are not to be opened so long as our son is alive and still a pupil. It is much safer, however, to seal up both the substitutions in the final tablets; because, if they have been sealed up or separated in the manner above described, it may readily be conjectured from the one that the  
 182 same person is also substituted in the other. It is not only to those of our children under puberty whom we have instituted heirs that we can make a substitution to the effect that, if they die in pupillarity, the person whom we have chosen shall be their heir,—we may do so also for children we have disinherited; and in such a case if the pupil have acquired anything in the shape of inheritances, bequests, or donations  
 183 from kinsmen, it will all belong to the substitute. All that has been said about substitution for impuberate children, whether instituted or disinherited, applies equally to those  
 184 that may be after-born. But we cannot substitute to a stranger-institute on the footing that, if he become heir but die within a certain period, another person shall be his heir; all that we can do is, by creation of a trust, to lay him under

<sup>1</sup> According to M. and K. u. S., the words *separatim* and *consignatae uel* are glosses, and the first obviously inaccurate.

<sup>2</sup> Between *altera* and *quoque* the ms. has *alter*, obviously *per incuriam*.

§ 182. § 4, tit. I. afd. Comp. Vlp. xxiii, 8.

§ 183. § 4, tit. I. afd.

<sup>1</sup> See §§ 130 f.

§ 184. § 9, tit. I. afd.

<sup>1</sup> Before *heredi*, P., following the Inst., interjects *uel puberi filio*.

sum obligemus ut hereditatem nostram uel totam uel [*pro*] parte restituat; quod ius quale sit suo loco <sup>2</sup> trademus.

- 185 Sicut autem liberi homines, ita et serui, tam nostri quam  
 186 alieni, heredes scribi possunt. Sed noster seruus simul et liber et heres esse iuberi debet, id est hoc modo: STICHVS SERVVS MEVS LIBER HERESQVE ESTO, uel HERES LIBERQVE ESTO: 187 nam si sine libertate heres institutus sit, etiamsi postea manumissus fuerit a domino, heres esse non potest, quia institutio in persona eius non constitit; ideoque licet alienatus sit non 188 potest iussu domini noui cernere hereditatem. Cum libertate uero heres institutus, si quidem in *eadem* causa durauerit, fit ex testamento liber *et inde* necessarius heres: si uero ab ipso testatore manumissus fuerit, suo arbitrio hereditatem adire potest; quodsi alienatus sit, iussu noui domini adire hereditatem debet, qua ratione per eum dominus fit heres: nam *ipse neque* heres neque liber esse potest.<sup>1</sup>

obligation to convey the inheritance wholly or partially to another: how this is done we shall explain in its proper place.

- 185 Slaves, whether our own or belonging to another person,  
 186 may be instituted heirs quite as well as freemen. But a slave of our own must be manumitted and appointed heir simultaneously, thus: 'Let Stichus my slave be free and heir,' 187 or 'my heir and free.' For, if he have been instituted heir without grant of freedom, he cannot be heir, even though he may in the meanwhile have been manumitted by his owner, the institution having been invalid from the point of view of his *persona* at the time; and, for the same reason, if he have been alienated in the meanwhile he cannot cern on the in- 188 structions of his new owner. A slave instituted with gift of liberty, if he have till the last remained in the ownership of the testator, becomes free under the testament, and hence a necessary heir; if, however, he have been manumitted by the testator, it is in his own discretion to enter upon the inheritance; if he have been alienated, he can enter only on the order of his new owner, who thus becomes heir through the slave,—for the latter can now neither be heir nor

<sup>2</sup> §§ 246 f., 277.

§§ 185-190. Comp. tit. I. *DE HEREDIBVS INSTITVENDIS* (ii, 14).

§§ 185, 186. Comp. Vlp. xxii, 7; Paul. iii, 4b, § 7; pr. tit. I. afd.

§ 187. Comp. Vlp. xxii, § 11.

§ 188. Comp. §§ 87, 153; Vlp. xxii, §§ 11, 12; § 1, tit. I. afd.

<sup>1</sup> P., borrowing from the Inst., adds—*etsi cum libertate heres institutus fuerit; destituisse enim a libertatis datione uidetur dominus.*



- 189 Alienus quoque seruus heres institutus, si in eadem causa durauerit, *iussu* domini hereditatem adire debet; si uero alienatus ab eo fuerit, *aut uiuo* testatore aut post mortem eius, antequam cernat, debet iussu noui domini *cernere*: si uero manumissus est suo arbitrio adire hereditatem potest.
- 190 Si autem seruus alienus heres institutus est uulgari cretione data, ita intellegitur dies cretionis cedere si ipse seruus scierit se heredem institutum esse, nec ullum impedimentum sit quominus certiozem dominum faceret ut illius iussu cernere possit.
- 191 Post haec uideamus de legatis. quae pars iuris extra propositam quidem materiam uidetur: nam loquimur de his iuris figuris quibus per uniuersitatem res nobis adquiruntur: sed cum omni modo de testamentis deque heredibus qui testamento instituuntur locuti sumus, non sine causa sequenti loco poterit haec iuris materia tractari.

- 189 free. If another man's slave instituted as heir continue in the same ownership, he enters upon the inheritance or not as his owner may direct; if he have been alienated, either during the testator's lifetime or after his death, but before cretion, he must cern on the order of his new owner; but if he have been manumitted, he may use his own discretion as to entering upon the inheritance.
- 190 If he have been instituted under ordinary cretion, the cretionary period is held to begin to run only when the slave himself has become aware of his institution, and there is nothing to prevent him informing his owner of the fact, and so being in a position to cern on his command.
- 191 After all this let us turn our attention to legacies. It is a branch of the law not exactly within our present subject-matter; for we are dealing with the modes known to the law of acquiring things on a universal title. But as we have discussed from every point of view the law of testaments and testamentary heirs, this matter of legacies may, not without reason, be treated of in the next place.

§ 189. Comp. § 87; Vlp. xxii, 13; § 1, tit. I. afd.

§ 190. Comp. § 172.

§§ 191-223. Comp. tit. I. *DE LEGATIS* (ii, 20). The rubric *de legatis* is in-

troduced in the ms., in a later hand, on a vacant line between §§ 191 and 192.

§ 191. Pr. tit. I. afd. Comp. above, § 97.

- 192 Legatorum itaque genera sunt quattuor: aut enim per uindicationem legamus, aut per damnationem, aut sinendi modo, aut per praeceptionem.
- 193 Per uindicationem hoc modo legamus: TITIO uerbi gratia HOMINEM STICHVM DO LEGO; sed [*et*] si *alterutrum*<sup>1</sup> uerbum positum sit, ueluti DO aut LEGO, aequè per uindicationem legatum est: *item, ut magis uisum est, si* ita legatum fuerit: SVMITO, uel *ita: SIBI HABETO, uel* ita: CAPITO, aequè per uindicationem legatum est. *Ideo autem* per uindicationem legatum appellatur quia post *aditam* hereditatem statim ex iure Quiritium res legatarii fit; et si eam rem legatarius uel ab herede uel ab alio quocumque qui eam possidet petat, uindicare<sup>1</sup> debet, id est intendere *suam rem* ex iure Quiritium esse. In eo solo dissentiunt prudentes, *quod Sabinus* quidem et Cassius ceterique nostri praeceptores<sup>1</sup> quod ita legatum sit statim post *aditam* hereditatem putant fieri legatarii, etiamsi

- 192 There are then four kinds of legacies; for we legate either by vindication, by damnation, by permission, or by preception.
- 193 By vindication we legate thus: 'To Titius I give and legate,' for example, 'the slave Stichus.' If one or other only of the words be used, as 'I give,' or 'I legate,' the bequest is equally one by vindication. And so it is, according to the prevailing opinion, if the words employed be—'Titius is to take,' (*sumito* or *capito*), or 'is to have for himself.' A legacy by vindication is so called because the thing bequeathed becomes the property of the legatee in quiritarian right the moment the inheritance has been entered upon; and, if the legatee have on account of it to sue either the heir or any third party in possession, he must do so by vindication, *i.e.* he must plead that the thing is his in quiritarian right.
- 195 On this point alone the jurists disagree,—that Sabinus, Cassius, and the rest of our school, are of opinion that the thing legated at once becomes the property of the legatee when the inheritance has been entered on, even though he be ignorant of the bequest, but that if he have [*declined it*] after hearing of it, it is as if it had not been bequeathed; whereas Nerva and Proculus, and the other leaders of their school, hold that the bequest does not become the property of the legatee unless such be his

§192. Comp. Vlp. xxiv, 2; §2, tit. I. afd.

§193. Comp. Vlp. xxiv, 3.

<sup>1</sup> The ms. apparently has *alterum*; so has Hu.; G., Bk., P., and K.u.S., *alterutrum*.

§194. Comp. Th. ii, 20, §2.

<sup>1</sup> Comp. iv, 41.

§195. Comp. Paul. iii, 6, §7.

<sup>1</sup> See i, 196, note 1.

ignoret sibi legatum esse [dimissum],<sup>2</sup> *sed*<sup>3</sup> posteaquam scierit et — —<sup>4</sup> legatum, perinde esse atque si legatum non esset; Nerua uero et Proculus ceterique illius scholae auctores<sup>1</sup> non aliter putant rem legatarii fieri quam si uoluerit eam ad se pertinere. sed hodie ex diui Pii Antonini constitutione hoc magis iure uti uidemur quod Procuro placuit; nam cum legatus fuisset latinus<sup>5</sup> per uindicationem coloniae, ‘Deliberent,’ inquit, ‘decuriones, an ad se uelint pertinere, proinde ac si  
196 uni legatus esset.’ Eae autem solae res per uindicationem legantur recte quae ex iure Quiritium ipsius testatoris sunt; sed eas quidem res quae pondere numero mensura constant, placuit sufficere si mortis tempore sint ex iure Quiritium testatoris, ueluti uinum oleum frumentum pecuniam numeratam; ceteras res uero placuit utroque tempore testatoris ex iure Quiritium esse debere, id est et quo faceret testamentum

pleasure. At the present day, as appears from a constitution of our late emperor Antoninus Pius, we seem rather to follow the rule laid down by Proculus; for, when a latin had been legated by vindication to a colony, he wrote: ‘The decurions must deliberate whether they wish to have him, just as if he  
196 had been legated to an individual.’ Those things alone can competently be legated by vindication which belong to the testator himself in quiritarian right. As regards those that pass by weight, number, or measure, such as wine, oil, corn, and current coin, it is held to be sufficient that they belonged to the testator in quiritarian right at the time of his death; but as regards other things it is held that they must have been his in quiritarian right at both times, *i.e.* both when he made his testament and at the time he died, otherwise the

<sup>2</sup> Hu. and K. u. S. regard this word as a gloss, the former on the ground that although *dimittere legatum* occurs in the West Gothic Gaius, in the sense of *leg. relinquere*, it is not to be found in any of the Roman texts. M. (K. u. S. p. xxi) makes it *demissum*. P. retains it, but in a different acceptation. As *admittere legatum* (§ 200) means to accept a legacy, so, according to him, does *dimittere* mean to reject it. He accordingly severs *dimissum* from the preceding words, and, filling up the lacuna with *etiam spretum*, reads—*dimissum, et posteaquam scierit etiam spretum legatum, perinde esse, etc.*,

*i.e.* a legacy that the legatee has expressly repudiated (or put away from him), or even one that, knowing of its bequest, he has simply disregarded, etc.

<sup>3</sup> The ms. has *et*.

<sup>4</sup> The letters in the ms. look like *ceerit*, but are very indistinct. G. (on suggestion of Niebuhr), Bk., and now Hu., think *spreuerit* a likely reading; it finds its justification in iii, 62, and § 8, tit. I. af. P., as mentioned in last note, proposes *etiam spretum*; M. suggests *omiserit*; K. u. S., *repudiauerit*.

<sup>5</sup> Comp. § 155, note 2; iii, §§ 56–58.

§ 196. Comp. Vlp. xxiv, 7.

- 197 et quo moreretur, alioquin inutile est legatum. Sed sane hoc ita est iure ciuili: postea uero auctore Nerone Caesare senatusconsultum factum est, quo cautum est ut si eam rem quisque legauerit quae eius numquam fuerit, proinde utile sit legatum atque si optimo iure relictum esset: optimum autem ius est per damnationem legati; quo genere etiam aliena res
- 198 legari potest, sicut inferius<sup>1</sup> apparebit. Sed si quis rem suam legauerit, deinde post testamentum factum eam alienauerit, plerique putant non solum iure ciuili inutile esse legatum sed nec ex senatusconsulto confirmari. quod ideo dictum est, quia et si per damnationem aliquis rem suam legauerit eamque postea alienauerit, plerique putant, licet ipso iure debeat legatum, tamen legatarium petentem posse per exceptionem doli mali<sup>1</sup> repelli, quasi contra uoluntatem defuncti
- 199 petat. Illud constat, si duobus pluribusue per uindicationem eadem res legata sit, siue coniunctim siue disiunctim,<sup>1</sup> partes ad singulos pertinere et deficientis portionem collegatario ad-

- 197 legacy will be useless. Such at least was the rule of the civil law. But afterwards, on the suggestion of the emperor Nero, a senatusconsult was enacted, wherein it was provided that if a man legated a thing that had never been his, the legacy should be as valid as if it had been bequeathed in the most favourable form: and the most favourable form of legacy is by damnation; for in that way, as will appear presently, one
- 198 may bequeath even what belongs to a third party. If a man have legated something of his own, but have alienated it after making his testament, most jurists hold that the legacy is not only invalid by the civil law, but is not even validated by the senatusconsult. The ground of this opinion is that when a man has bequeathed something of his own by damnation and afterwards alienated it, while, according to most authorities, the legacy is due *ipso iure*, nevertheless, the legatee, if he sue for it, may be defeated by an exception of fraud, as making a claim inconsistent with the real intent of
- 199 the deceased. It is a well-established rule that if the same thing be legated by vindication to two or more persons, whether conjointly or disjointly, they take each a share, while

§ 197. Comp. Vlp. xxiv, 11a.

<sup>1</sup> See § 202.

§ 198. Comp. § 12; tit. I. afd.

<sup>1</sup> See § 76, note 3.

§ 199. Comp. § 206; Vlp. xxiv, 12;

Paul. iii, 6, § 26; § 8, tit. I. afd.

<sup>1</sup> After *disiunctim* the ms. has *et omnes ueniant ad legatum*; but this is so inconsistent with the immediately following *deficientis portio* that the words must be rejected as a gloss.



- crescere. coniunctim autem ita legatur: TITIO ET SEIO HOMINEM STICHVM DO LEGO; disiunctim ita: LVCIO TITIO HOMINEM  
 200 STICHVM DO LEGO. SEIO EVNDEM HOMINEM DO LEGO. Illud quaeritur, quod sub condicione per uindicationem legatum est, pendente condicione cuius esset: nostri praeceptores<sup>1</sup> heredis esse putant exemplo statuliberi,<sup>2</sup> id est eius serui qui testamento sub aliqua condicione liber esse iussus est, quem constat interea heredis seruum esse; sed diuersae scholae auctores<sup>1</sup> putant nullius interim eam rem esse; quod multo magis dicunt<sup>3</sup> de eo quod [sine condicione]<sup>4</sup> pure legatum est, antequam legatarius admittat legatum.
- 201 Per damnationem hoc modo legamus: HERES MEVS STICHVM SERVVM MEVM DARE DAMNAS<sup>1</sup> ESTO; sed et si DATO scriptum

- the share of any one who fails accretes to his co-legatee. A thing is legated conjointly thus: 'To Titius and Seius I give and legate the slave Stichus;' and disjunctly thus: 'To Lucius Titius I give and legate the slave Stichus: I give and legate  
 200 the same slave to Seius.' When a thing is conditionally legated by vindication, it is a question whose it is while the condition is unfulfilled. Our authorities hold it belongs to the heir, on the analogy of a *statuliber*, i.e. a slave who has by testament a conditional grant of freedom, and who, as is admitted, belongs in the meanwhile to the heir. But the authorities of the other school think that in the meantime the thing belongs to no one; and *a fortiori* they maintain the same doctrine in reference to an unconditional legacy not yet accepted by the legatee.
- 201 By damnation we legate in this way: 'Be my heir bound to give my slave Stichus;' but though the words be simply—'Let my heir give,' the legacy is still one by damnation.

§ 200. Comp. Gai. in fr. 29, § 1, D. *qui et a quib. man.* (xl, 9); Vlp. in fr. 12, § 2, D. *fam. ercisc.* (x, 2).

<sup>1</sup> See i, 196, note 1.

<sup>2</sup> Comp. Vlp. ii, §§ 1, 2.

<sup>3</sup> Comp. § 195.

<sup>4</sup> As the text stands, either *sine condicione* or *pure* must be regarded as a gloss. Van der Hoeven (*Z. f. RG.* vii, p. 258) suggests *sine condicione per uindicationem*; his theory being that the two last words were represented by the contraction *pu*, which the transcriber has transformed into *pure*.

§ 201. Comp. Vlp. xxiv, 4; Th. ii, 20, § 2.

<sup>1</sup> *Damnas* is a word for which it is not easy to give a precise English equivalent. It is thus explained by Serv. (in *Aen.* xii, 727)—*In iure cum dicitur 'Damnas esto,' hoc est damnatus es ut des, hoc est damno te ut des neque alias libereris.* The phrase *damnas esto* was employed where a penalty or liability was imposed by a law, whether a public statute, such as the *lex Mamilia*, *lex Iulia Municipalis*, *lex Aquilia*, etc., or a law established by a private individual by a public act (§ 104, note 8), as in the *uerba nuncupata* of a *neuvum* or a testament, or in the dedication of a monument whose safety the

202 fuerit, per damnationem legatum est. Eoque genere legati  
 etiam aliena res legari potest, ita ut heres [*rem*] redimere et  
 203 praestare aut aestimationem eius dare debeat. Ea quoque  
 res quae in rerum natura non est, si modo futura est, per  
 damnationem legari potest, uelut 'fructus qui in illo fundo  
 204 nati erunt,' aut 'quod ex illa ancilla natum erit.' Quod  
 autem ita legatum est, post aditam hereditatem, etiamsi pure  
 legatum est, non, ut per uindicationem legatum,<sup>1</sup> continuo  
 legatario acquiritur, sed nihilo minus heredis est; et ideo  
 legatarius in personam agere debet, id est intendere heredem  
 sibi dare oportere,<sup>2</sup> et tum heres [*rem*], si Mancipii sit, man-  
 cipio dare<sup>3</sup> aut in iure cedere<sup>4</sup> possessionemque tradere debet;  
 si nec Mancipii sit, sufficit si tradiderit:<sup>5</sup> nam si Mancipii rem  
 tantum tradiderit nec Mancipauerit, usucapione pleno iure fit  
 legatarii:<sup>6</sup> completur autem usucapio, sicut alio *quoque loco*

202 By this form of legacy even what belongs to another may be  
 bequeathed; and then the heir is bound either to purchase  
 203 and convey it or else to pay its value. What has no natural  
 existence can also be legated by damnation, provided it may  
 be expected to come into existence later; as, for instance, the  
 crop to be produced from particular lands, or the child to be  
 204 born of a particular woman-slave. A thing thus legated,  
 even unconditionally or without limitation of time, does not  
 straightway become the property of the legatee when the  
 inheritance is entered upon, like a legacy by vindication, but  
 none the less still belongs to the heir. Therefore the legatee  
 must sue for it by a personal action, *i.e.* must plead that the  
 heir is bound to give him it; the heir, if the thing be *res*  
*Mancipii*, must then Mancipate it or cede it in court, and give  
 up the possession; but if it be *nec Mancipii* it is enough that  
 he deliver it. If, being a *res Mancipii*, he has merely delivered  
 it without Mancipation, it becomes the legatee's in plenary  
 right by usucapion; and, as explained elsewhere, that usu-

founder was protecting by a penalty. A party contravening the prohibition, or failing to perform the duty thus imposed, was said to be *damnatus* (iii, 175); and there is reason to believe that, in early times, when proceedings against him became necessary, and the liability was for a definite sum of money, they were taken not by action but by *manus iniectio* (iv, 21).

The meaning of the phrase *damnas*

*esto* is very fully discussed by Brini, *Archivio Giuridico*, xxi, pp. 225 f.

§ 202. Comp. § 197; Vlp. xxiv, 8; § 4, tit. I. afl.

§ 203. § 7, tit. I. afl.

§ 204. <sup>1</sup> Comp. § 194.

<sup>2</sup> Comp. § 213; iv, 41.

<sup>3</sup> Comp. i, 119.

<sup>4</sup> Comp. § 24.

<sup>5</sup> Comp. § 19.

<sup>6</sup> Comp. § 41.

*a damnas or*

K

- diximus, mobilium quidem rerum anno, earum uero quae solo  
 205 tenentur biennio.<sup>7</sup> Est et illa differentia *huius et* per uin-  
 dicationem legati, quod si eadem res duobus pluribusue per  
*damnationem* legata sit, siquidem coniunctim, plane singulis  
 partes debentur, *sicut in illo [quod per]* uindicationem lega-  
 tum est,<sup>1</sup> *si uero* disiunctim, singulis solida res debetur; *ita fit*  
 ut scilicet heres alteri rem alteri aestimationem eius praestare  
 debeat; et in coniunctis deficientis portio non ad collegata-  
 rium pertinet sed in hereditate remanet.
- 206 Quod autem diximus deficientis portionem *in* per damna-  
 tionem quidem legato in hereditate retineri, in per uindica-  
 tionem uero collegatario adcrecere, admonendi sumus ante  
 legem Papiam<sup>1</sup> iure ciuili ita fuisse; post legem uero Papiam  
 deficientis portio caduca<sup>2</sup> fit, et ad eos pertinet qui in eo testa-  
 207 mento liberos habent. et quamuis prima causa sit in  
 caducis uindicandis<sup>2</sup> heredum liberos habentium, deinde, si  
 heredes liberos non habeant, legatariorum liberos habentium,

capion is completed in the case of moveables in one year, and  
 205 in that of things connected with the soil in two. There is  
 this further difference between a legacy of this sort and one  
 by vindication,—that if the same thing be legated by damna-  
 tion to two or more persons, and that conjointly, a share of it  
 is due to each of them, as in a legacy bequeathed by vindica-  
 tion; but if it be legated to them disjunctly, the whole legacy  
 is due to each, so that the heir must give the thing itself to  
 one, and its value to the other. In a conjoint legacy of this  
 sort the share of one who fails to take does not fall to his  
 co-legatee, but remains in the inheritance.

- 206 But in saying that the share of a legatee failing to take  
 remains in the inheritance in the case of a legacy by damna-  
 tion, but goes by accretion to his co-legatee in that of one by  
 vindication, we must bear in mind that so it was by the civil  
 law before the Papian enactment; since the Papian law the  
 lapsed share becomes caducous, and falls to those persons  
 named in the testament who happen to have children.
- 207 Although the right to claim caducuary bequests belongs in the  
 first place to the heirs who have children, and next, if there  
 be none such, to the legatees who have children, yet it is

<sup>7</sup> Comp. § 42.

§ 205. Comp. § 199; Vlp. xxiv, 13.

<sup>1</sup> Passage indistinct in the ms.;  
 the rendering adopted is that of  
 K. u. S.

§§ 206-208. Comp. §§ 150, note, and  
 199, 205; Vlp. i, 21; xxiv, §§ 12, 13.

<sup>1</sup> Comp. § 150, note; i, 145,  
 note 1.

<sup>2</sup> Comp. §§ 286, 286a.

- tamen ipsa lege Papia significatur ut collegatarius coniunctus, si liberos habeat, potior sit heredibus, etiamsi liberos habebunt.
- 208 sed plerisque placuit, quantum ad hoc ius quod lege Papia coniunctis constituitur, nihil interesse utrum per uindicationem an per damnationem legatum sit.
- 209 Sinendi modo ita legamus: HERES MEVS DAMNAS<sup>1</sup> ESTO SINERE LVCIVM TITIVM HOMINEM STICHVM SVMERE SIBIQUE
- 210 HABERE. Quod genus legati plus quidem habet [*quam*] per uindicationem legatum, minus autem quam per damnationem: nam eo modo non solum suam rem testator utiliter legare potest sed etiam heredis sui, cum alioquin per uindicationem nisi suam rem legare non potest, per damnationem autem
- 211 cuiuslibet extranei rem legare potest. Sed si quidem mortis testatoris tempore res uel ipsius testatoris sit uel heredis, plane utile legatum est, etiamsi testamenti faciendi tempore
- 212 neutrius fuerit. quodsi post mortem testatoris ea res heredis esse coeperit, quaeritur an utile sit legatum: et plerique putant inutile esse. quid ergo est? licet aliquis eam rem

expressly provided by the Papian law that a conjoint co-legatee who has children shall be preferred even to the heirs that

208 have children. And it is generally held, as regards the right thus conferred by the Papian law upon conjoint legatees, that it is immaterial whether the legacy be by vindication or by damnation.

209 By permission, *sinendi modo*, we legate thus: 'Be my heir bound to allow Lucius Titius to take and have for himself the

210 slave Stichus.' There is more in a legacy of this sort than in one by vindication, but less than in one by damnation. For in this form a testator may effectually legate not only what is his own but also what is his heir's; whereas by vindication a man can legate only what belongs to himself, while by damnation he may legate the property of any third party.

211 If, at the time of the testator's death, the thing legated belong either to him or his heir, then clearly the legacy is valid, although at the time of executing the testament it may have

212 belonged to neither. If however it have not become the property of the heir until after the testator's death, it is a question whether the legacy be of any use; the general opinion is that it is not. But what of that? Although a man

§ 209. Comp. Vlp. xxiv, 5; Th. ii, 20, § 20.

§ 210. Comp. Vlp. xxiv, 10; Paul. iii, 6, § 11.

<sup>1</sup> The ms. has *DARE DAMNAS ESTO*, obviously *per incuriam*. See § 201, note 1.

§ 212. Comp. § 197.



- legauerit quae neque eius umquam fuerit neque postea heredis eius umquam esse coeperit, ex senatusconsulto Neroniano pro-
- 213 inde uidetur<sup>1</sup> ac si per damnationem relicta esset. sicut autem per damnationem legata res non statim post aditam hereditatem legatarii efficitur, sed manet heredis eo usque donec is<sup>1</sup> tradendo uel mancipando uel in iure cedendo legatarii eam fecerit, ita et in sinendi modo legato iuris est; et ideo huius quoque legati nomine in personam actio est QUID-
- 214 QUID HEREDEM EX TESTAMENTO DARE FACERE OPORTET.<sup>2</sup> sunt tamen qui putant ex hoc legato non uideri obligatum heredem ut mancipet aut in iure cedat aut tradat, sed sufficere ut legatarium rem sumere patiat; quia nihil ultra ei testator imperauit quam ut sinat, id est patiat, legatarium rem sibi
- 215 habere. Maior illa dissensio in hoc legato interuenit: si eandem rem duobus pluribusue disiunctim legasti,<sup>1</sup> quidam putant utrisque solidam deberi, sicut per *damnationem*;<sup>2</sup> non-

- have legated [by permission] a thing that was never his, and has never subsequently become his heir's, yet by the Neronian senatusconsult it is regarded as if bequeathed by damnation.
- 213 Just as a thing legated by damnation does not at once become the property of the legatee when the inheritance is entered upon, but continues to belong to the heir until the latter has made it the legatee's by tradition, mancipation, or cession in court, so is it when the legacy is bequeathed *sinendi modo*; consequently the action for a legacy of this sort is also a personal one, the claim being for 'whatever the heir ought to
- 214 give or do under the testament.' There are some jurists, however, who think that in this kind of legacy the heir is under no obligation to mancipate, cede in court, or deliver the thing bequeathed, but that it is enough that he suffer the legatee to take it; because the testator has laid no further command upon him than that he shall permit or suffer the
- 215 legatee to appropriate the thing. There is this more important difference of opinion in reference to a legacy of this sort: if you have legated the same thing to two or more

<sup>1</sup> K. (K. u. S. footnote) thinks *utile* should be interpolated before *uidetur*.

§ 213. Comp. § 204; Th. ii, 20, § 2.

<sup>1</sup> The ms. interjects *heres* between *is* and *tradendo*.

<sup>2</sup> Comp. iv, §§ 41, 47.

§ 214. Comp. Alfen. in fr. 29, D. *locati*, (xix, 2).

§ 215. Comp. Cels. in fr. 14, D. *de usu et usufr. leg.* (xxxiii, 2); Inst. in l. un. § 11, C. *de caduc. toll.* (vi, 51).

<sup>1</sup> So the ms.; Hu. reads *legata sit*, changing *rem* into *res*.

<sup>2</sup> The ms. has *uindicationem*; the reason for preferring *damnationem* is obvious. P. and K. u. S. regard the three words as a gloss.

nulli occupantis esse meliorem condicionem aestimant, quia cum eo genere legati damnetur heres patientiam praestare ut legatarius rem habeat, sequitur ut si priori patientiam praestiterit et is rem sumpserit, securus sit aduersus eum qui postea legatum petierit, quia neque habet rem ut patiatur eam ab eo sumi, neque dolo malo fecit quominus eam haberet.

- 216 Per praeceptionem hoc modo legamus: LVCIVS TITIVS HOMI-  
 217 NEM STICHVM PRAECIPITO. Sed nostri quidem praeceptores<sup>1</sup> nulli alii eo modo legari posse putant nisi ei qui aliqua ex parte heres scriptus esset: praecipere enim esse praecipuum sumere; quod tantum in eius persona procedit qui aliqua ex parte heres institutus est, quod is extra portionem hereditatis  
 218 praecipuum legatum habiturus sit. ideoque si extraneo legatum fuerit, inutile est legatum, adeo ut Sabinus existimauerit ne quidem ex *senatusconsulto* Neroniano<sup>1</sup> posse conualescere: ‘nam eo,’ inquit, ‘senatusconsulto ea tantum confirmantur quae uerborum uitio iure ciuili non ualent, non quae propter

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persons disjointly, some hold that the whole of it is due to each, as in the case of a legacy by damnation; but others think that he who first appropriates it is in the better position, because, as all that the heir is bound to prestate in such a case as this is sufferance, it follows that if he have accorded this sufferance to the first comer, and the latter have taken the thing away, the heir is safe against any subsequent claim for the legacy, seeing he neither has the thing, so as to be in a position to suffer it to be taken from him, nor has he done anything fraudulent to prevent the legatee appropriating it.

- 216 By preception we legate in this fashion: ‘Let Lucius Titius  
 217 first take the slave Stichus.’ Our authorities are of opinion that no one can have a legacy bequeathed to him in this form who is not instituted heir to a part of the inheritance; for *praecipere* is to take a *praecipuum*, [*i.e.* something separated from the rest of the estate before any distribution]; and that can be done only by one who is instituted heir for a part, because he is to have what is legated to him by preception  
 218 over and above his share of the inheritance. Therefore if the legacy be to one who is not an heir, it is useless, so much so that Sabinus held it incapable of conualescence under the Neronian *senatusconsult*; ‘for,’ says he, ‘those legacies alone are validated by that *senatusconsult* which are invalid by the

§ 216. Comp. Vlp. xxiv, 6; Th. ii, 20, § 2. § 218. Comp. Vlp. xxiv, 11a.

§ 217. <sup>1</sup> See i, 196, note 1.

<sup>1</sup> Comp. § 197.

ipsam personam legatarii non debentur.' sed Iuliano et Sexto<sup>2</sup> placuit etiam hoc casu ex senatusconsulto confirmari legatum; nam ex uerbis etiam hoc casu accidere ut iure ciuili inutile sit legatum inde manifestum esse, quod eidem aliis uerbis recte legetur, ueluti per uindicationem, per damnationem, sinendi modo; tunc autem uitio personae legatum non ualere cum ei legatum sit cui nullo modo legari possit, uelut peregrino<sup>3</sup> cum quo testamenti factio<sup>4</sup> non sit; quo plane casu senatusconsulto  
 219 locus non est. Item nostri praeceptores quod ita legatum est nulla *actione*<sup>1</sup> putant posse consequi eum cui ita fuerit legatum quam iudicio familiae erciscundae,<sup>2</sup> quod inter heredes de hereditate erciscunda, id est diuidunda, accipi solet: officio enim iudicis id contineri ut ei quod per praeceptionem legatum  
 220 est adiudicetur. Vnde intellegimus nihil aliud secundum

civil law because of some defect of language,—not such as are not due because of some disability in the legatee.' But Julian and Sextus held that even here the legacy was validated by the senatusconsult; that in this case also it is through erroneous wording that the legacy is by the civil law invalid, is manifest, [say they], from the consideration that it would have been valid if bequeathed in another form of words, namely by vindication, damnation, or permission; and a legacy is only then invalid through disability of the individual when it is in favour of a person to whom a legacy cannot be bequeathed in any way, as, for instance, a peregrin with whom  
 219 no room for the senatusconsult. Our authorities are also of opinion that the only process whereby a legatee can recover a legacy bequeathed to him in this form is a *iudicium familiae erciscundae*,—the action resorted to amongst heirs for 'herciscating' an inheritance, *i.e.* dividing it; for it is part of the official duty of the judge to adjudicate a legacy by preception  
 220 [to the heir entitled to it]. Hence we gather that, accord-

<sup>2</sup> The original words in the ms. were Iuliano *ex* Sexto, not *et*; the latter is an interlinear alteration. It is impossible to say which is right. The Julianus here referred to is Salvius Iulianus, the consolidator of the praetorian edict in the reign of Hadrian. The Sextus has generally been supposed to refer to Pomponius; Mommsen (*Z. f. RG.* vii, 479) thinks it may be Sextus Caecilius Africanus; the first was a contemporary of Julian's, the latter one of his scholars.

<sup>3</sup> Comp. § 285; Vlp. xxii, 2.

<sup>4</sup> See § 114, note 1.

§ 219. Comp. Paul. iii, 6, § 1; Th. ii, 20, § 2.

<sup>1</sup> Previous eds. read [*alia*] *ratione*; but the ms. gives quite distinctly the contracted form of *actione*, only interpolating an accidental *r* before it.

<sup>2</sup> Comp. iv, 42; Vlp. xix, 16; §§ 4, 7, I. *de offic. iud.* (iv, 17).

§ 220. Comp. Vlp. xxiv, 11; Paul. iii, 6, § 8.



nostrorum praeceptorum opinionem per praeceptionem legari posse nisi quod testatoris sit : nulla enim alia res quam hereditaria deducitur in hoc iudicium. itaque si non suam rem eo modo testator legauerit, iure quidem civili inutile erit legatum; sed ex senatusconsulto confirmabitur. aliquo tamen casu etiam alienam rem per praeceptionem legari posse fatentur, ueluti si quis eam rem legauerit quam creditori fiduciae causa<sup>1</sup> mancipio dederit; nam officio iudicis coheredes cogi posse existimant soluta pecunia *luere*<sup>2</sup> eam rem, ut possit praecipere is  
 221 cui ita legatum sit.<sup>3</sup> sed diuersae scholae auctores putant etiam extraneo per praeceptionem legari posse, proinde ac si ita scribatur: TITIVS HOMINEM STICHVM CAPITO, superuacuo adiecta PRAE syllaba; ideoque per *uindicationem eam rem* legatam uideri: quae sententia dicitur diui Hadriani constitutione  
 222 firmata esse. Secundum hanc igitur opinionem si ea res ex iure Quiritium<sup>1</sup> defuncti fuerit *potest*<sup>2</sup> a legatario uindicari, siue

ing to the opinion of our school, nothing can be legated by preception that is not the property of the testator; for nothing that does not belong to the inheritance is included in this action. Therefore if a testator have legated in this way something that is not his, the legacy will be invalid by the civil law; but it will be validated by the senatusconsult. There is a case, however, in which they admit that what belongs to a third party may be legated by preception, namely when a man has legated a thing which he has fiduciarly mancipated to a creditor; for they hold it to be within the powers of the judge to require the co-heirs, by payment of the debt, to release the thing in question, that so he to whom it has been  
 221 legated may take it by preception. The authorities of the other school think that a legacy may be left by preception even to a stranger, as if the words ran—‘Titius is to take the slave Stichus;’ holding that the addition of the syllable *prae* [*i.e.* before distribution] is superfluous, and the thing therefore to be regarded as legated by vindication. This opinion is said  
 222 to have been confirmed by a constitution of the late emperor Hadrian’s. According to this view, therefore, if the thing legated belonged to the deceased in quiritarian right, it may be vindicated by the legatee, whether he be one of the heirs

<sup>1</sup> Comp. § 60.<sup>2</sup> So L. and most subsequent eds.; the MS. has *soluere*.<sup>3</sup> Comp. Gai. in fr. 26, fr. 28, D. *fam. ercisc.* (x, 2).

§ 222. Comp. §§ 40, 196, 197.

<sup>1</sup> See i, 54, and note; ii, 40, and note.<sup>2</sup> So G. and most eds.; the MS. has *posse*; P. suggests *paret posse*.



- is unus ex heredibus sit siue extraneus; si<sup>3</sup> in bonis tantum testatoris fuerit, extraneo quidem ex senatusconsulto utile erit legatum, heredi uero familiae herciscundae iudicis officio praestabitur; quodsi nullo iure fuerit testatoris, tam heredi quam
- 223 extraneo ex senatusconsulto utile erit. Si<sup>1</sup> tamen heredibus secundum nostrorum opinionem, siue etiam extraneis secundum illorum opinionem, duobus pluribusue eadem res coniunctim aut disiunctim legata fuerit, singuli partes habere debent.
- 224 Sed olim quidem licebat totum patrimonium legatis atque libertatibus erogare, nec quicquam heredi relinquere praeterquam inane nomen heredis; idque lex XII tabularum permittere uidebatur, qua cauetur ut quod quisque de re sua testatus esset id ratum haberetur, his uerbis: 'uti legasset suae rei, ita ius esto:'<sup>1</sup> *quare*<sup>2</sup> qui scripti heredes erant ab hereditate se<sup>3</sup> ab-

- or a stranger; if it was only *in bonis* of the testator, the legacy will be effectual to a stranger by the senatusconsult, while to an heir it will be made available by the judge in an *actio familiae herciscundae*; if it did not belong to the testator either in quiritarian or bonitarian right, it will be effectual under
- 223 the senatusconsult either to an heir or to a stranger. If the same thing be legated [by preception] to two or more persons, either conjointly or disjointly,—whether they be heirs, according to our opinion, or strangers, according to that of the other school,—each is entitled to a share of it.
- 224 In olden times it was lawful to exhaust the whole patrimony in legacies and gifts of freedom, and leave nothing for the heir but the empty name. And this seemed to be permitted by the law of the Twelve Tables, which, in the words—'As a man has legated in regard to his belongings, so be it

<sup>3</sup> The MS. seems originally to have had *quod si*, with interlinear emendation *et si*; P. and K. u. S. retain the former, Hu. the latter.

§ 223. Comp. Inst. in l. un. § 11, C. de caduc. toll. (vi, 51).

<sup>1</sup> So M. (K. u. S. p. xxi); the MS. and all eds. have *siue*.

§§ 224-228. Comp. tit. I. DE LEGE FALCIDI (ii, 22). In the MS., before § 224, there is a vacant line, on which is the rubric *ad legem Falcidiam* in a later hand.

§ 224. Comp. pr. tit. I. afd.; Th. ii, 22, pr.

<sup>1</sup> The MS. has *uti legasset suae res*,

*ita*, etc. P., in an excursus appended to Book III. of his *Syntagma*, argues that the provision ran—*uti legasset suae res* (for *rei*) *ius esto*, i.e. 'as a man may have testamentarily disposed of his family patrimonial rights (*ius suae rei*), so be it.' Comp. Schoell, *Tab.* v, 3; Cic. *de inuent.* ii, 50, § 148; *Auctor ad Herenn.* i, 13, § 23; Vlp. xi, 14; Pomp. in fr. 120, D. *de V. S.* (l, 16); Nov. xxii, c. 2. See also above § 104 and notes.

<sup>2</sup> So K. u. S. and Hu.; the MS. has *que*, which P. interprets *qua aetate*.

<sup>3</sup> So the MS.; P. reads *saepe*.

- 225 stinebant, et idcirco plerique intestati moriebantur. Itaque lata est lex Furia, qua, exceptis personis quibusdam,<sup>1</sup> ceteris plus mille assibus legatorum nomine mortisue causa capere<sup>2</sup> permissum non est. sed et haec lex non perfecit quod uoluit: qui enim uerbi gratia quinque milium aeris patrimonium habebat, poterat quinque hominibus singulis millenos asses
- 226 legando totum patrimonium erogare. Ideo postea lata est lex Voconia, qua cautum est ne cui plus legatorum nomine mortisue causa capere liceret quam heredes caperent: ex qua lege plane quidem aliquid utique heredes habere uidebantur; sed tamen uitium simile nascebatur: nam in multas legatari-  
orum personas distributo patrimonio poterat [*testator*] adeo heredi minimum relinquere, ut non expeditet heredi huius

law,' provided that whatever testamentary disposition a man might make of his estate should be sustained; whence it came about that those who were instituted heirs often abstained from the inheritance, and many persons thus died intestate.

- 225 For this reason the Furian law was enacted, whereby all but certain excepted persons were forbidden to take more than a thousand *asses* by way of legacy or otherwise by reason of death. But this enactment did not accomplish what it intended; for a testator who had say five thousand *asses* of patrimony could still give away the whole of it by legating to five
- 226 different people a thousand *asses* each. So, after a while, the Voconian law was passed, providing that it should not be lawful for any one to take more in name of legacy or otherwise by reason of death than remained to the heirs. Thanks to it, it seemed very clear that the heirs must at all events get something: yet here too a defect soon showed itself almost of the same sort as before; for, by distributing his estate amongst a multitude of legatees, a testator was able to leave so little to his heir as to make it not worth the latter's while, for the sake of this small gain, to undertake the burdens of the whole in-

§ 225. The *lex Furia testamentaria* was a plebiscit passed in 571 | 183 (?). Comp. Cic. *pro Balbo*, viii, § 21; Vlp. i, 2; xxviii, 7; Fr. Vat. § 301; Th. ii, 22, pr.

<sup>1</sup> The excepted persons were kinsmen up to the sixth degree, including the *sobrino natus*; Fr. Vat. § 301.

<sup>2</sup> According to Ihering (*G. d. R. R.* vol. iii, part 1, p. 114, note) the *mortis causa capio* referred to may have been the result of an institu-

tion of A. as heir on condition of his paying say 10,000 *asses* to B. This was not in form a legacy to B.; but if he accepted it, it was on his part *mortis causa capio*. For other forms of it see fr. 8 pr., fr. 31, pr. § 2, fr. 38, D. *de mort. c. donat.* (xxxix, 6).

§ 226. The *lex Voconia*, a plebiscit of 585 | 169, introduced by Q. Voconius Saxa at the instance of the elder Cato, was one of the most famous of the Roman sumptuary laws. In its first chapter it pro-

- 227 *lucri gratia totius hereditatis onera sustinere. Lata est itaque lex Falcidia, qua cautum est ne plus ei legare liceat quam dodrantem: itaque necesse est ut heres quartam partem*  
 228 *hereditatis habeat: et hoc nunc iure utimur. In libertatibus quoque dandis nimiam licentiam conpescuit lex Fufia Caninia, sicut in primo commentario rettulimus.*  
 229 *Ante heredis institutionem [in]utiliter legatur, scilicet quia testamenta uim ex institutione heredis accipiunt, et ob id uelut caput et fundamentum intellegitur totius testamenti*  
 230 *heredis institutio. Pari ratione nec libertas ante heredis*  
 231 *institutionem dari potest. Nostri praeceptores<sup>1</sup> nec tutorem eo loco dari posse existimant: sed Labeo et Proculus<sup>1</sup> tutorem*

- 227 *heritance. Therefore the Falcidian law was enacted, which provides that it shall not be lawful for a testator to dispose of more than three-fourths of his estate in legacies; thus the heir must necessarily have a fourth of the inheritance. This*  
 228 *is the law now in observance. The Fufia-Caninian law likewise, as stated in our first Commentary, has placed some restriction on extravagance in [testamentary] gifts of freedom.*  
 229 *Until an heir has been instituted it is useless to bequeath a legacy; for it is from the institution of an heir that testaments derive their efficacy,—in fact, the institution is regarded as the*  
 230 *starting-point and foundation of the whole deed. For the same reason a gift of freedom cannot precede the heir's institu-*  
 231 *tion. Neither, according to our school, can the appointment of a tutor; but Labeo and Proculus think that, as a tutor's*

hibited a citizen, whose fortune was estimated in the censorial register at 100,000 *asses* or more, from instituting a woman, even his daughter or sister, as his heir; Cic. *II. Verr.* i, 41, 42, §§ 107, 108; below, § 274; Aug. *de ciu. Dei*, iii, 21. In its second, however, it allowed such a citizen to leave to women legacies of a greater amount than was sanctioned by the Furian law, provided these did not in the aggregate exceed one-half of the testator's estate; Quintil. *Declam.* 246. The third, that referred to in the text, forbade any one to take more as a legacy or otherwise through death under the testament of such a citizen than remained to the heir or heirs; Cic. *II. Verr.* i, 43, § 110; Th. ii, 22, pr.

§ 227. The Falcidian law, also a ple-

biscit, and enacted in 714 | 40, repealed the restrictions of the Furian and Voconian laws in the matter of bequest, substituting the provision in the text. It apparently did not contain any reference to other *mortis causa capio* than that resulting from a legacy. Comp. Dio. Cass. xlviii, 33; Vlp. xxiv, 32; Paul. iii, 8, § 1; Paul. in fr. 1, pr. D. *ad l. Falcid.* (xxxv, 2); pr. tit. I. *afd.*

§ 228. Comp. i, 42.

§§ 229-237. Comp. §§ 34-36, tit. I. *DE LEGATIS* (ii, 20). In the ms., on a vacant line before § 229, we have the rubric *de inutiliter relictis legatis*.

§§ 229, 230. Comp. Vlp. i, 20; xxiv, 15; § 34, tit. I. *afd.*

§ 231. Comp. § 3, I. *qui dari tut. poss.* (i, 14).

<sup>1</sup> See i, 196, note 1.



- posse dari, quod nihil ex hereditate erogatur tutoris datione.
- 232 Post mortem quoque heredis inutiliter legatur, id est hoc modo: CVM HERES MEVS MORTVVS ERIT DO LEGO,<sup>1</sup> aut DATO.<sup>2</sup> ita autem recte legatur: CVM HERES MORIETVR, quia non post mortem heredis relinquitur, sed ultimo uitae eius tempore. rursum ita non potest legari: PRIDIE QVAM HERES MEVS MORIETVR; quod non pretiosa ratione receptum uidetur. Eadem
- 233 et de libertatibus dicta intellegemus. Tutor uero an post mortem heredis dari possit quaerentibus eadem forsitan poterit esse quaestio *quae*<sup>1</sup> de [*eo*] agitur qui ante heredum institutionem datur.
- 234
- 235 Poenae quoque nomine inutiliter legatur. poenae autem nomine legari uidetur quod coercendi heredis causa relinquitur, quo magis heres aliquid faciat aut non faciat, ueluti quod ita legatur: SI HERES MEVS FILIAM SVAM TITIO IN MATRIMONIUM CONLOCAVERIT, X [*MILIA*] SEIO DATO, uel ita: SI FILIAM TITIO IN

- appointment takes nothing out of the inheritance, he may be
- 232 nominated [even before an heir has been instituted]. It is useless also to legate as after the heir's death, thus: 'On my heir's death I give and legate,' or—'let him give.' But a legacy 'when my heir is dying' is quite regular; for it is not left after the heir's death but in his last moments. On the other hand one cannot legate thus: 'The day before my heir dies;' a rule which seems to have been adopted without any
- 233 adequate reason. The same remarks are to be understood
- 234 as applying to gifts of freedom. Whether a tutor can be appointed after the death of the heir is a question that probably depends on the same consideration as that previously mooted, namely, whether he can be appointed before an heir has been instituted.
- 235 A legacy by way of penalty is also useless. And that is held to be legated by way of penalty which is bequeathed for the purpose of coercing the heir to do or forbear from something; as, for instance, a legacy in these terms: 'If my heir bestow his daughter in marriage on Titius, then let him give ten thousand sesterces to Seius;' or in these: 'If my heir do

§ 232. Comp. iii, 100; Vlp. xxiv, 16;  
Paul. iii, 6, §§ 5, 6; iv, 1, § 11;  
§ 35, tit. I. *afd.*

<sup>1</sup> Comp. § 193.

<sup>2</sup> Comp. § 201.

§ 233. Comp. Vlp. i, 20.

§ 234. Comp. § 231; Paul. in fr. 7, D.  
*de test. tut.* (xxvi, 2).

<sup>1</sup> The MS. has *quam*, and omits the *eo*. At the best the sentence is clumsy.

§ 235. On a vacant line before this par. the MS. has the rubric *de poenae causa relictis legatis* in the original hand. Comp. Vlp. xxiv, 17; xxv, 13; § 36, tit. I. *afd.*



- MATRIMONIUM NON CONLOCAVERIS, X MILIA TITIO DATO; sed et si *heredem*, [si] uerbi gratia intra biennium monumentum sibi non fecerit, X [milia] Titio dare iusserit, poenae nomine legatum est. et denique ex ipsa definitione multas similes species
- 236 *circumspicere*<sup>1</sup> possumus. Nec libertas quidem poenae
- 237 nomine dari potest, quamuis de ea re fuerit quaesitum. De tutore uero nihil possumus quaerere, quia non potest datione tutoris heres compelli quidquam facere aut non facere: ideo, *quando etiam*<sup>1</sup> poenae nomine tutor datus fuerit, magis sub condicione quam poenae nomine datus uidebitur.
- 238 Incertae personae legatum inutiliter relinquitur. incerta autem uidetur persona quam per incertam opinionem animo suo testator subicit, *uelut cum* ita legatum sit: QVI PRIMVS AD FVNVS MEVM VENERIT, (*EI HERES*) MEVS X [MILIA] DATO; idem

- not bestow his daughter in marriage on Titius, then let him give Titius ten thousand sesterces.' Further, if he have ordered his heir to give ten thousand sesterces to Titius in the event say of his, the heir's, failure to erect a monument within two years to him, the testator, the legacy is again by way of penalty. And, briefly, from the mere definition, we can conceive for ourselves many other instances of the same
- 236 sort of thing. Not even freedom can be given by way of penalty, (although on this point there has been doubt.)
- 237 As regards a tutor the question cannot arise. An heir cannot be compelled to do or forbear from anything merely by the fact that a tutor is appointed in the will; if therefore any such appointment seem on the face of it to have been made by way of penalty, it must be held conditional rather than penal.
- 238 A legacy to an uncertain person is also useless. And that person is regarded as uncertain of whose individuality the testator has formed no definite idea in his own mind, as when he legates thus: 'To the person who comes first to my funeral my heir shall give ten thousand sesterces.' The law is the same if the testator have legated to all and sundry in

<sup>1</sup> P. and K. u. S. both admit that this seems to be the reading of the ms., but doubt its propriety; Hu. adopts it.

§ 236. Comp. § 36, tit. I. afd.

§ 237. Comp. Marcian. in fr. 2, D. *de poen. causa relict.* (xxxiv, 6).

<sup>1</sup> So P.; the ms. has *quae datur*, which he thinks must have been an inaccurate rendering by the transcriber of the *qdo et* of the original.

Hu. reads *facere ideo quod datur*. [*Si igitur*] *poenae nomine*, etc. M. (K. u. S. footnote), *ideoque* [*etsi secundum mentem testatoris is qui tutor*] *datus est poenae nomine*, etc.

§§ 238-245. Comp. §§ 25-33, tit. I. *DE LEGATIS* (ii, 20).

§ 238. Comp. Vlp. xxiv, 18; Paul. iii, 6, § 13; § 25, tit. I. afd., from which, except *milia*, the words in italics are borrowed.

iuris est si generaliter omnibus legauerit: QVICVMQVE AD  
 FVNVS MEVM VENERIT. in eadem causa est quod ita relinqui-  
 tur: QVICVMQVE FILIO MEO IN MATRIMONIUM FILIAM SVAM CON-  
 LOCAVERIT, EI HERES MEVS X MILIA DATO; illud quoque<sup>1</sup> quod  
 ita relinquitur: QVI POST TESTAMENTUM (*SCRIPTUM PRIMI*)  
 CONSVLES DESIGNATI ERVNT, aequae incertis personis legari  
 uidetur; et denique aliae multae huiusmodi species sunt.  
 Sub certa uero demonstratione incertae personae recte lega-  
 tur, ueluti: EX COGNATIS MEIS QVI NVNC SVNT QVI PRIMVS AD  
 239 FVNVS MEVM VENERIT, EI X MILIA HERES MEVS DATO. Libertas  
 quoque non uidetur incertae personae dari posse, quia lex  
 240 Fufia Caninia iubet nominatim seruos liberari. Tutor quo-  
 241 que certus dari debet. Postumo quoque alieno inutiliter  
 legatur. *est autem* alienus postumus qui natus inter suos  
 heredes testatori futurus non est: ideoque ex emancipato  
 quoque filio conceptus nepos extraneus *postumus est; item*  
*qui in utero est eius quae iure ciuili*<sup>1</sup> non intellegitur uxor,<sup>2</sup>

such words as—‘Whoever shall come to my funeral.’ Of the  
 same character is a legacy in these terms: ‘To any man that  
 bestows his daughter in marriage on my son my heir shall  
 give ten thousand sesterces.’ A legacy bequeathed thus:  
 ‘Whoever shall be the next consuls designate after the execu-  
 tion of my testament,’ is equally regarded as in favour of  
 uncertain persons; and there are many other varieties of it.  
 One may competently legate, however, to an uncertain person  
 who is indicated by a definite description; as, for example:  
 ‘To that one of my kinsmen now alive who comes first to my  
 239 funeral my heir shall give ten thousand sesterces.’ It is  
 also held impossible to make a testamentary gift of freedom  
 to an uncertain person; for the Fufia-Caninian law ordains  
 240 that slaves shall be enfranchised by name. Further, it is  
 241 only a definite person that can be appointed as tutor. A  
 legacy to a stranger after-born is also invalid. By a stranger  
 after-born we mean a person who will not on birth be one of  
 the *sui heredes* of the testator; therefore the grandchild be-  
 gotten of an emancipated son will be a stranger after-born;  
 and a child *in utero* of a woman whom the *ius ciuile* does  
 not recognise as a wife is held to be a stranger after-born

<sup>1</sup> After *illud quoque* the MS. has  
*in eadem causa est*; but these words  
 are deleted as an unnecessary gloss.

§ 239. Comp. i, §§ 42, 45a; § 25, tit.  
 I. afd.

§ 240. Comp. § 289; § 27, tit. I. afd.

§ 241. § 26, tit. I. afd. Comp. § 287.

<sup>1</sup> In contradistinction to *iure gen-  
 titium*.

<sup>2</sup> A marriage without *conubium*

242 extraneus postumus patri intellegitur. Ac ne heres  
quidem potest institui postumus alienus: est enim incerta  
243 persona. Cetera uero quae supra diximus ad legata proprie  
pertinent quamquam non inmerito quibusdam placeat poenae  
nomine heredem institui non posse: nihil enim interest utrum  
legatum dare iubeatur heres si fecerit aliquid aut non fecerit,  
an coheres ei adiciatur; quia tam coheredis adiectione quam  
legati datione compellitur ut aliquid contra propositum suum  
faciat aut non faciat.

244 An ei qui in potestate sit eius quem heredem instituimus  
recte legemus quaeritur. Seruius<sup>1</sup> recte legari probat, sed  
evanescere legatum si quo tempore dies legatorum cedere  
solet<sup>2</sup> adhuc in potestate sit; ideoque siue pure legatum sit  
et uiuo testatore in potestate heredis esse desierit, siue sub  
condicione et ante condicionem id acciderit, deberi legatum.

242 even in relation to his father. Nor can a stranger after-  
243 born be instituted heir; for he is an uncertain person. The  
foregoing observations apply more especially to legacies. But  
some hold, and not without reason, that an heir cannot be  
instituted by way of penalty; for it is a matter of indiffer-  
ence whether an heir be ordered to pay a legacy in the event  
of his doing or not doing something, or [in that event] have  
a co-heir conjoined with him; because alike by the addition  
of a co-heir and by the giving of a legacy he is compelled to  
do or forbear contrary to his own inclination.

244 It is a question whether we can lawfully legate to one who  
is in the *potestas* of the instituted heir. Servius holds that  
we can, but that the legacy evanishes if at the time it vests  
the legatee be still *in potestate*; consequently that, if the  
legacy be unconditional and the legatee have ceased to be *in*  
*potestate* during the testator's lifetime, or if it be conditional  
and he become *sui iuris* before the condition is fulfilled, it  
must be paid. Sabinus and Cassius think that a conditional

was not *matrimonium iuris ciuiliis*  
(i, 56; Vlp. v, 2); its issue were  
not *in potestate* of their father (i,  
§§ 67, 80); therefore they could not  
be his *sui heredes* if born in his life-  
time (ii, 156); and the text is only  
consequent in declaring that they  
must be *postumi alieni* (or *extranei*)  
if born after his death (or, rather,  
after the execution of his testament).

§ 242. Comp. i, 147; ii, 287; § 28, tit.  
I. afd. Justinian there states the  
law inaccurately; it was he himself

who first declared that a *postumus*  
*alienus* might be instituted heir; see  
pr. I. *de bon. poss.* (iii, 9).

§ 243. Comp. §§ 229, 232, 235; § 36,  
tit. I. afd.

§ 244. Comp. Vlp. xxiv, 23; § 32, tit.  
I. afd.

<sup>1</sup> Servius Sulpicius Rufus; see i,  
188, note 5.

<sup>2</sup> Comp. Vlp. xxiv, 31. For the  
meaning of the technical phrases  
*dies cedit* and *dies uenit* see fr. 213,  
D. *de V. S.* (l, 16).

Sabinus et Cassius<sup>3</sup> sub condicione recte legari, pure non recte, putant; licet enim uiuo testatore possit desinere in potestate heredis esse, ideo tamen inutile legatum intellegi oportere, quia quod nullas uires habiturum foret si statim post testamentum factum decessisset testator, hoc ideo ualere quia uitam longius traxerit absurdum esset;<sup>4</sup> *sed* diuersae scholae auctores<sup>5</sup> nec sub condicione recte legari, quia quos in potestate habemus eis non magis sub condicione quam  
 245 pure debere possumus. Ex diuerso constat ab eo qui in potestate [*tua*] est herede instituto, recte tibi legari; sed si tu per eum heres extiteris euanescere legatum, quia ipse tibi legatum debere non possis; si uero filius emancipatus aut seruus manumissus erit uel in alium translatus, et ipse heres extiterit aut alium fecerit, deberi legatum.

246 *Nunc* transeamus ad fideicommissa. [247] Et prius de  
 247 hereditatibus uideamus.

legacy to him is valid, but not a pure one; that even though it be possible for him to cease to be in the heir's *potestas* during the testator's lifetime, still the legacy must be regarded as useless, because it would be absurd that what would have been of no effect had the testator died the moment after making his testament should become valid for no other reason than that his life has been prolonged. The authorities of the other school are of opinion that we cannot legate to such a person even conditionally; because we can no more be conditionally indebted to persons in our *potestas* than we can be  
 245 unconditionally. On the other hand it is admitted that you may competently have bequeathed to you a legacy that is to form a charge upon a person in your *potestas* who has been instituted heir; but if through his instrumentality you have become heir the legacy evanishes, because you cannot owe a legacy to yourself. If however your son be emancipated, or your slave either manumitted or alienated, and either he or another person through his means have become heir, then your legacy will be due.

246 Now let us pass to *mortis causa* trusts, *fideicommissa*.  
 247 And let us begin with [fideicommissary] inheritances.

<sup>3</sup> See i, 196, note 1.

<sup>4</sup> This is the so-called *regula Catoniana*; on which see tit. D. *de reg. Cat.* (xxxiv, 7).

§ 245. Comp. Vlp. xxiv, 24; § 33, tit. I. afd.

§§ 246-259. Comp. tit. I. *DE FIDEICOMMISSARIIS HEREDITATIBVS* (ii, 23).

§§ 246, 247. Pr. tit. I. afd. The ms. has *Hinc transeamus*, etc.



- 248 Inprimis igitur sciendum est opus esse ut aliquis heres  
recto iure instituatur, eiusque fidei committatur ut eam heredi-  
tatem alii restituat; alioquin inutile est testamentum in quo  
249 nemo recto iure heres instituitur.<sup>1</sup> Verba autem [utilia]<sup>1</sup>  
fideicommissorum haec [recte]<sup>1</sup> maxime in usu esse videntur  
—PETO, ROGO, VOLO, FIDEICOMMITTO, quae proinde firma singula  
250 sunt atque si omnia in unum congesta sint. Cum igitur  
scripserimus: [LVCIVS] TITIVS HERES ESTO, possumus adicere:  
ROGO TE, LVCI TITI, PETOQVE A TE, VT CVM PRIMVM POSSIS HERE-  
DITATEM MEAM ADIRE, CAIO SEIO REDDAS RESTITVAS. possumus  
autem et de parte restituenda rogare; et liberum est uel sub  
condicione uel pure relinquere fideicommissa, uel ex die certa.  
251 Restituta autem hereditate is qui restituit nihilo minus heres  
permanet; is uero qui recipit hereditatem aliquando heredis  
252 loco est aliquando legatarii. Olim autem nec heredis loco  
erat nec legatarii sed potius emptoris: tunc enim in usu erat  
ei cui restituebatur hereditas nummo uno eam hereditatem

- 248 The first thing to be noted is that it is necessary that some  
one be regularly instituted heir according to law, and that it  
be committed to his honour to restore the inheritance to a  
third party; for a testament is useless in which there is no  
249 one in due form instituted heir. Of the words suitable for  
fideicommissary disposition these seem most in use,—*peto*,  
*rogo*, *uolo*, *fideicommitto*; and each by itself is as effective as  
250 if all were used together. When therefore we have written  
in our testament—‘Lucius Titius be heir,’ we may add: ‘I  
ask you, Lucius Titius, and desire of you, that as soon as you  
have been able to enter upon the inheritance, you give it up  
and restore it to Caius Seius.’ But we may limit our request  
to restitution of a part of the inheritance; and it is in our  
power to bequeath the trust-gift either conditionally or uncon-  
251 ditionally, or as from a certain date. On restitution of the  
inheritance he who has restored it nevertheless still remains  
heir; he who has received it is sometimes in the position of  
252 heir, sometimes in that of a legatee. But formerly he was  
in the place neither of heir nor of legatee, but rather of a  
purchaser. For it was then the practice that the inheritance

§ 248. § 2, tit. I. afd.

<sup>1</sup> Comp. § 229.

§ 249. § 3, I. *de sing. reb. p. fid. rel.*

(ii, 24). Comp. Vlp. xxv, §§ 1, 2;

Paul. iv, 1, §§ 5, 6.

<sup>1</sup> Apparently glosses.

§ 250. § 2, tit. I. afd.

§ 251. § 3, tit. I. afd. Comp. § 255.

§ 252. The *pro forma* sale was to pave  
the way for the interchange of the  
stipulations. Comp. Th. ii, 23,  
§ 3.

dicis causa uenire; et quae stipulationes inter [*uenditorem hereditatis et emptorem interponi solent, eadem interponebantur inter*]<sup>1</sup> heredem et eum cui restituebatur hereditas, id est hoc modo: heres quidem stipulabatur ab eo cui restituebatur hereditas, ut quicquid hereditario nomine condemnatus *solvisset*,<sup>2</sup> siue quid alias bona fide dedisset, eo nomine *indemnisset*,<sup>3</sup> et omnino si quis cum eo hereditario nomine ageret ut recte defenderetur; ille uero qui recipiebat hereditatem inuicem stipulabatur ut si quid ex hereditate ad heredem peruenisset id sibi restitueretur, ut etiam pateretur eum hereditarias actiones procuratorio aut cognitorio nomine<sup>4</sup> exequi.

253 Sed posterioribus temporibus<sup>1</sup> Trebellio Maximo et Annaeo Seneca consulibus senatusconsultum factum est,<sup>2</sup> quo cautum

should, for form's sake, be sold for a single coin to the person to whom it was to be restored, and the same stipulations that *were usually interchanged between the vendor and purchaser of an inheritance were interchanged between the heir and the person to whom the inheritance was restored, in this way: the heir took a promise from him to whom he was restoring the inheritance that he, the heir, should be kept scathless in respect of any payment made in pursuance of any judgment given against him on account of the inheritance, or of anything given otherwise in good faith, and that he should in every case be duly defended when sued in his character of heir; while he, in turn, who received the inheritance, took a promise from the heir that the latter would restore anything belonging to it that might come into his hands, and that he would allow the stipulant to prosecute all actions competent in respect of the inheritance as his, the heir's, procurator or*  
253 *cognitor*. But at a later period, in the consulate of Trebellius Maximus and Annaeus Seneca, it was provided by a

<sup>1</sup> These words interpolated by G. and justified by context.

<sup>2</sup> So K. u. S.; the ms. and most eds. have *fuisse*; P. reads *ut quid quid hereditario nomine [dedisset, siue cuius rei nomine] condemnatus fuisse*, etc.

<sup>3</sup> Savigny's reading, universally accepted; the ms. has *indenisset*.

<sup>4</sup> Comp. iv, §§ 82-87.

§ 253. § 4, tit. I. afd. Comp. Vlp. xxv, 14; Paul. iv, 2.

<sup>1</sup> So the ms., K. u. S., and Hu.;

P. reads *postea Neronis temporibus*.

<sup>2</sup> It appears from one of the numerous wax tablets recording the business transactions of an *argentarius* (banker and auctioneer), discovered at Pompeii in 1875, that Trebellius Pollio and L. Annaeus Seneca were consuls in the latter half of the year 56, (Petra, *Tavollette*, p. 21); this fixes a date hitherto uncertain. The Sct. is reproduced by Vlp. in fr. 1, § 1, D. ad SC. Trebell. (xxxvi, 1).

est ut si cui hereditas ex fideicommissi causa restituta sit, actiones quae iure ciuili heredi et in heredem competerent ei et in eum darentur cui ex fideicommisso restituta esset hereditas; per quod senatusconsultum desierunt illae cautiones in usu haberi: praetor enim utiles actiones<sup>3</sup> ei et in eum qui recepit hereditatem, quasi heredi et in heredem, dare coepit, 254 eaeque in edicto proponuntur. Sed rursus quia heredes scripti, cum aut totam hereditatem aut paene totam plerumque restituere rogabantur, adire hereditatem ob nullum aut minimum lucrum recusabant, atque ob id exstinguebantur fideicommissa, *postea* Pegaso et Pusione [*consulibus*]<sup>1</sup> senatus censuit, ut ei qui rogatus esset hereditatem restituere perinde liceret quartam partem retinere atque e lege Falcidia in legatis retinendis<sup>2</sup> conceditur; (ex singulis quoque rebus, quae per fideicommissum relinquuntur, eadem retentio permissa est;) per quod senatusconsultum ipse onera hereditaria sustinet; ille autem qui ex fideicommisso reliquam partem hereditatis

senatusconsult that, when an inheritance was restored to any person on the ground of a trust, the actions competent by the civil law to or against the heir should be given to or against the party to whom the inheritance was restored *ex fideicommisso*. In consequence of this senatusconsult the stipulations of which we have been speaking went out of use; for the praetor began to grant *utiles actiones* to and against the recipient of the inheritance, as if to or against an heir; and 254 these are set forth in the edict. Still later, and because the instituted heirs, when asked to restore the whole or nearly the whole of the inheritance, often refused to enter upon what was to yield them little or no profit, and thus caused the extinction of the fideicommissary gifts, the senate, in the consulate of Pegasus and Pusio, decreed that an heir who was asked to restore an inheritance should be entitled to retain a fourth part of it, just as by the Falcidian law he is entitled to do in respect of legacies; (and the same retention is allowed in the case of single things bequeathed by trust-gift.) By this senatusconsult it is the heir himself that has to bear the burdens of the inheritance, while he who receives the rest of it in terms of the trust is in the position of a partary legatee,

<sup>3</sup> See § 78, note 1.  
§ 254. § 5, tit. 1. affd. Comp. Vlp. xxv, §§ 14, 15; Paul. iv, 3.

<sup>1</sup> Pegasus and Pusio were consuls in the reign of Vespasian,

sometime between the years 70 and 80.

<sup>2</sup> So the ms.; M. regards the word as a gloss; K. u. S. substitute *retinere*, Hu. *retinendi ius*.

recipit legatarii partiarum loco est, id est eius legatarii cui pars bonorum legatur; quae species legati *partitio*<sup>3</sup> vocatur, quia cum herede legatarius partitur hereditatem: unde effectum est ut quae solent stipulationes inter heredem et partiarum legatarium interponi, eadem interponantur inter eum qui ex fideicommissi causa recipit hereditatem et heredem, id est ut et lucrum et damnum hereditarium pro rata parte inter eos  
 255 commune sit. Ergo siquidem non plus quam dodrantem<sup>1</sup> hereditatis scriptus heres rogatus sit restituere, tum ex Trebelliano senatusconsulto restituitur hereditas, et in utrumque actiones hereditariae pro rata parte dantur, in heredem quidem iure civili, in eum vero qui recipit hereditatem ex senatusconsulto Trebelliano; quamquam heres etiam pro ea parte quam restituit heres permanet, eique et in eum solidae actiones competunt; sed non ulterius oneratur nec ulterius illi dantur actiones quam apud eum commodum hereditatis  
 256 remanet. at si quis plus quam dodrantem uel etiam totam hereditatem restituere rogatus sit, locus est Pegasiano senatus-

*i.e.* a legatee to whom a share of the estate is legated. (A legacy of this sort is called *partitio*, because the legatee shares, *partitur*, the inheritance with the heir.) The result is that the same stipulations that are wont to pass between an heir and a partiarum legatee are exchanged between the fideicommissary recipient of the inheritance and the heir, namely, that the profit and loss of the succession shall be common to both  
 255 in proportion to their respective interests. If therefore the instituted heir be asked to restore no more than three-fourths of the inheritance, he does so under the Trebellian senatusconsult, and actions affecting the inheritance are granted against both parties according to their respective interests,—against the heir, by the civil law, against the individual to whom the inheritance is restored, under the Trebellian senatusconsult. For although the heir remains heir even as regards the part he has restored, and [according to the civil law] action is competent to or against him *in solidum*, yet [under the senatusconsult] he is not held responsible, nor are actions granted to him, beyond the beneficial interest in the inheritance that  
 256 he still retains. But if the heir be asked to restore more than three-fourths, perhaps the whole, of the inheritance, the

<sup>3</sup> Comp. Vlp. xxiv, 25; Th. ii, 23, § 5.  
 §§ 255, 256. § 6, tit. I. afd. Comp.  
 Vlp. xxv, 14.

<sup>1</sup> Comp. § 5, tit. I. *de hered. inst.*  
 (ii, 14).



- 257 consulto. Sed is qui semel adierit hereditatem, si modo sua uoluntate adierit, siue retinuerit quartam partem siue noluerit retinere, ipse uniuersa onera hereditaria sustinet: sed quarta quidem retenta quasi partis et pro parte<sup>1</sup> stipulationes interponi debent, tamquam inter partiarium legatarium et heredem; si uero totam hereditatem restituerit, ad exemplum emptae et uenditae hereditatis stipulationes<sup>2</sup>
- 258 interponendae sunt. Sed si recuset scriptus heres adire hereditatem ob id quod dicat eam sibi suspectam esse quasi damnosam, cauetur Pegasiano senatusconsulto ut, desiderante eo cui restituere rogatus est, iussu praetoris adeat et restituat, proindeque ei et in eum qui receperit actiones dentur ac iuris est ex senatusconsulto Trebelliano: quo casu nullis stipulationibus opus est, quia simul et huic qui restituit securitas datur, et actiones hereditariae ei et in eum transferuntur qui
- 259 receperit hereditatem. Nihil autem interest utrum aliquis

- 257 Pegasian senatusconsult comes into play. If he have once entered, provided always he has done so voluntarily, then, whether he have retained his fourth or have not cared to do so, he is liable for the whole burdens of the succession: if he have retained his fourth, stipulations similar to those between an heir and a partiarly legatee must be interchanged for his share and in proportion thereto, *partis et pro parte*; but if he have restored the whole inheritance, then stipulations are to be interchanged after the model of those employed when
- 258 an inheritance has been bought and sold. But if he refuse to enter, alleging that he has reason to suspect the inheritance may be a source of loss to him, it is provided by the Pegasian senatusconsult that, on the application of the party to whom he is asked to make restitution, he may be required to enter and restore by order of the praetor, and that actions shall be granted to and against the recipient as would be done under the Trebellian senatusconsult. In this case there is no need of any stipulations, for at the same time security is afforded to him who has restored the inheritance, and the actions affecting it are transferred to and against him who
- 259 has got it back. It is of no moment whether an heir

§ 257. § 6, tit. I. afd. Comp. Vlp. xxv, 15; Paul. iv, 3, § 2.

<sup>1</sup> *Partis*, i.e. that each shall have his share of the assets; *pro parte*, that each shall bear his own share

of the charges.

<sup>2</sup> Comp. § 252.

§ 258. § 6, tit. I. afd. Comp. Vlp. xxv, 16; Paul. iv, 4.

§ 259. § 8, tit. I. afd.

ex asse<sup>1</sup> heres *institutus*<sup>2</sup> aut totam hereditatem aut pro parte restituere rogetur, an ex parte heres institutus aut totam eam partem aut partis partem restituere rogetur : nam et hoc casu de quarta parte eius partis ratio ex Pegasiano senatusconsulto haberi solet.

- 260 Potest autem quisque etiam res singulas per fideicommissum relinquere, uelut fundum hominem uestem argentum pecuniam, et uel ipsum heredem rogare ut alicui restituat uel legata-  
 261 rium, quamuis a legatario legari non possit.<sup>1</sup> Item potest non solum propria testatoris res per fideicommissum relinqui, sed etiam heredis aut legatarii aut cuiuslibet alterius : itaque et legatarius non solum de ea re rogari potest ut eam alicui restituat quae ei legata sit, sed etiam de alia, siue ipsius legatarii siue aliena sit. hoc solum obseruandum est, ne plus  
 262 quisquam rogetur alicui restituere quam ipse ex testamento ceperit ; nam quod amplius est inutiliter relinquitur. Cum

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instituted to the whole inheritance be asked to restore the whole or a part of it, or an heir instituted only to a share be asked to restore the whole or a part of that share ; for even in the latter case account will be taken under the Pegasian senatusconsult of a fourth of the share [to which he has been instituted].

- 260 It is also competent for a testator to bequeath single things by fideicommissary gift,—land, for example, or a slave, a garment, plate, money ; and either to ask the heir himself to restore it to some third party, or—though it is impossible to make a legacy a charge upon him—to ask the legatee to do  
 261 so. It is not only what belongs to the testator himself that may be bequeathed by trust, but also what belongs to the heir, a legatee, or even an utter stranger ; and therefore a legatee may be requested to give up to another person not only what is legated to him, but even something else, whether belonging to himself or to a third party. There is this only to remark,—that no man can be asked to give up more than he himself has got under the testament : a fideicommissary  
 262 bequest beyond that is useless. When something belong-

<sup>1</sup> Comp. § 5, tit. I. *de hered. inst.* (ii, 14).

<sup>2</sup> The ms. has *instituitur*.

§§ 260-267. Comp. tit. I. *DE SINGVLIS REBVS PER FIDEICOMMISSVM RELICTIS* (ii, 22).

§ 260. Pr. tit. I. *afid.*

<sup>1</sup> Comp. § 271 ; Vlp. xxiv, 20.

§ 261. § 1, tit. I. *afid.* Comp. Vlp. xxv, 5 ; Paul. iv, 1, §§ 7, 8.

§ 262. § 1, tit. I. *afid.* Comp. Vlp. and Paul. as in last note.

autem aliena res per fideicommissum relinquitur, necesse est ei qui rogatus est aut ipsam redimere et praestare aut aestimationem eius soluere, *sicut iuris est si*<sup>1</sup> per damnationem aliena res legata sit: sunt tamen qui putant si rem per fideicommissum relictam dominus non uendat extinguere fideicommissum; *sed aliam esse causam* per damnationem legati.

- 263 Libertas quoque seruo per fideicommissum dari potest, ut  
 264 uel heres rogetur manumittere uel legatarius. (*nec interest, utrum de suo proprio*) seruo testator roget, an de eo qui ipsius  
 265 heredis aut legatarii uel etiam extranei sit. Itaque et alienus seruus redimi et manumitti debet: quodsi dominus eum non uendat, sane extinguatur fideicommissaria libertas,  
 266 *quia hoc (casu)*<sup>1</sup> pretii computatio nulla interuenit. Qui autem ex fideicommisso manumittitur non testatoris fit libertus, etiamsi testatoris seruus ( *fuerit*), sed eius qui manumittit.  
 267 at qui directo testamento liber esse iubetur, uelut hoc modo:

ing to a third party is bequeathed by trust-gift, he who is asked to give it up must either purchase and convey it or pay its value instead, *as in the case of* a legacy by damnation of what belongs to another. There are some, however, who think that, if the owner of a thing bequeathed by trust-gift will not sell it, the bequest is extinguished; but that the rule is different as regards a legacy by damnation.

- 263 Further, there may be a grant of freedom to a slave by means of a trust, either the heir or a legatee being desired to  
 264 manumit him. Nor does it matter whether the request be to enfranchise a slave of the testator's, or one belonging to  
 265 the heir, a legatee, or even a stranger. If the slave be another person's, he must be purchased and manumitted; but if his owner will not sell him, the fideicommissary gift of freedom becomes void; for in this case there is no room  
 266 for an alternative money value. A slave who is manumitted in pursuance of a trust does not become a freedman of the testator's, even though he may have belonged to him,  
 267 but is a freedman of the manumitter's. But he who has a

<sup>1</sup> So G. and most eds.; see Labeo in fr. 30, § 6, D. *de leg. III.* (xxxii). The ms. seems to have *s . . . miri . . . es.*

§§ 263, 264. § 2, tit. I. afd., from which the words in ital. in § 264 are borrowed. Comp. § 272; Vlp. ii, §§ 7, 10; xxv, 18; Paul. iv, 12, § 4; iv, 13.  
 § 265. Comp. § 2, tit. I. afd.

<sup>1</sup> *Casu* illegible in the ms. Comp. Vlp. ii, 11; Vlp. in fr. 9, § 3, D. *de statulib.* (xl, 7)—*libertas pecunia lui non potest.*

§§ 266, 267. § 2, tit. I. afd., from which the words in brackets in § 267 (with exception of *Quiritium*) are borrowed. Comp. Vlp. ii, §§ 7, 8; Th. i, 14, § 1.

*STICHVS SERVVS MEVS LIBER ESTO, uel hoc : STICHVM SERVVM MEVM LIBERVV ESSE IVBEO, is (ipsius testatoris) fit libertus. nec alius ullus directo ex testamento libertatem habere potest quam qui utroque tempore testatoris ex iure (Quiritium (fuerit, et quo faceret) testamentum et quo moreretur.*

268 Multum autem (*differunt ea*) quae per fideicommissum *relin-*  
 269 *quuntur* ab his quae directo iure legantur. nam ecce per  
 fideicommissum — — heredis relinqui potest: cum alioquin  
 270 legatum — — — inutile sit. Item intestatus moriturus  
 potest ab eo ad quem bona eius pertinent fideicommissum alicui  
 270a relinquere, cum alioquin ab eo legari non possit. (*Item*  
*(legatum codicillis)* relictum non aliter ualet quam si a testatore  
 confirmati fuerint, id est, nisi in testamento cauerit testator  
 ut quidquid in codicillis scripserit id ratum sit; fideicom-  
 missum uero etiam non confirmatis codicillis relinqui potest.

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direct grant of freedom by testament in such words as these:  
 'My slave Stichus is to be free,' or, 'I order that my slave  
 Stichus shall be free,' is a freedman of the testator himself.  
 No one, however, can have a grant of freedom directly under  
 a testament who did not belong to the testator in quiritarian  
 right both at the time of the latter's testament-making and at  
 the time of his death.

268 Trust bequests differ in many respects from direct legacies.  
 269 — — — — —. [270] Further, an individual  
 270 about to die intestate may burden his successor with a trust  
 in favour of a third party; but he cannot so burden him with  
 270a a legacy. *Further, a legacy bequeathed by a codicil is not*  
*valid unless the latter have been confirmed by the testator,*  
*i.e. unless he have provided in his testament that any dispo-*  
*sition made by him by codicil shall be given effect to; but a*  
*trust-gift may be bequeathed by a codicil not thus confirmed.*

§ 268. Before this par. there are two vacant lines (p. 123, lines 1, 2), with faint traces of a rubric. The first four letters of *differunt* were legible to Bl.; but he has so greatly injured the page with his chemicals that some of what he could read must now be taken on trust. Part of it seems to have dealt with the same matter as tit. I. *DE CODICILLIS* (ii, 25).

§ 269. To complete this is hopeless; any reconstruction is pure guess-work, and may be put in half-a-dozen ways.

§ 270. Comp. Vlp. xxv, 4; § 1, tit. I. *afd.*

§ 270a. The first three words, though illegible in the ms., seem warranted by the context. Comp. Vlp. xxv, 8; Paul. iv, 1, § 10; § 1, tit. I. *afd.*



- 271 Item a legatario legari non potest; sed fideicommissum relinqui potest. quin etiam ab eo quoque cui per fideicommissum relinquimus rursus alii per fideicommissum relinquere possumus.
- 272 Item seruo alieno directo libertas dari non potest, sed
- 273 per fideicommissum potest. Item codicillis nemo heres institui potest neque exheredari, quamvis testamento confirmati sint; at is qui testamento heres institutus est potest codicillis rogari ut eam hereditatem alii totam uel ex parte restituat, quamvis testamento codicilli confirmati non sint.
- 274 Item mulier, quae ab eo qui centum milia aeris census est per legem Voconiam heres institui non potest, tamen fideicom-
- 275 misso relictam sibi hereditatem capere potest. Latini quoque, qui hereditates legataeque directo iure lege Iunia capere
- 276 prohibentur, ex fideicommisso capere possunt. Item cum

- 271 Further, a legacy cannot be charged upon a legatee, but a trust-gift may; nay, we may even burden an individual to whom we leave a trust-gift with a trust in favour of a third
- 272 party. Further, while freedom cannot be bequeathed directly to another man's slave, it may be given by trust deed.
- 273 Further, no one can either be instituted or disinherited by a codicil, even though it be confirmed by testament; but the heir instituted in the testament may be required by codicil to make over the inheritance, in whole or in part, to a third party, notwithstanding the codicil may not have been confirmed by the testament.
- 274 Further, although by the Voconian law a woman cannot be instituted heir by a man whose estate is valued in the censorial register at not less than a hundred thousand *asses*, yet she may nevertheless take an inheritance he has bequeathed to her by means of a trust.
- 275 Latins also, though prohibited by the Junian law from taking inheritances or legacies left to them directly, may yet take
- 276 under a *fideicommissum*. Further, although a man is for-

§ 271. Comp. §§ 260, 261; Vlp. xxiv, 20; pr. § 1, I. *de sing. reb.* (ii, 24).

§ 272. Comp. §§ 264, 267; § 2, I. *de sing. reb.* (ii, 24).

§ 273. Comp. Vlp. xxv, 11; § 10, I. *de fideicom. hered.* (ii, 23); § 2, tit. I. *affl.*

§ 274. See § 226, note.

§ 275. Comp. i, §§ 23, 24; Vlp. xxii, 3; xxv, 7.

§ 276. It is generally assumed that the allusion here to a *senatusconsult* is

erroneous, and that the provision referred to was one of those introduced by the *lex Aelia Sentia*, and mentioned above, i, 18.

From this view I differ. A testamentary gift merely of freedom made the slave under thirty a latin the moment the testament became operative by the succession of a *suus* or entry of a stranger (i, 22; Vlp. i, 11); and as a latin he might competently be instituted heir in another testament, though unable

senatusconsulto prohibitum sit proprium servum minorem annis xxx liberum et heredem instituere, plerisque placet posse nos iubere liberum esse cum annorum xxx erit, et rogare  
 277 ut tunc illi restituatur hereditas. Item quamvis non [*pos-*  
 [*simus*] post mortem eius qui nobis heres extiterit alium in locum eius heredem instituere, tamen possumus eum rogare ut cum morietur alii eam hereditatem totam vel ex parte restituat; et quia post mortem quoque heredis fideicommissum dari potest, idem efficere possumus et si ita scripserimus: CVM TITIVS HERES MEVS MORTVVS ERIT, VOLO HEREDITATEM MEAM AD PVBLIVM MEIVM PERTINERE: utroque autem modo, tam hoc quam illo, Titius heredem suum obligatum relinquit de  
 278 fideicommisso restituendo. Praeterea legata [*per*] formu-

bidden by senatusconsult to institute his slave under thirty as free and heir, yet it is the general opinion that he may declare that he shall be free on attaining that age, and desire  
 277 that the inheritance be then given up to him. Further, although we cannot institute a person to be our heir after the death and in the place of him who has actually become our heir, yet we may request the latter to make over the inheritance to another, either wholly or in part, when he is dying; and, as we can leave a trust-gift to be given after the death of the heir, we can effect the same result by expressing ourselves thus: 'When Titius, my heir, is dead, I wish my inheritance to go to Publius Mevius;' in either way, either the former or the latter, Titius leaves his heir bound to restore  
 278 the trust-gift. Moreover we sue for legacies by *formula*;

to enter unless he had converted his latinity into citizenship within the cretionary period (Vlp. xxii, 3). In the case in the text, however, the enfranchisement and institution proceeded from one and the same act, and had to take effect simultaneously or else both be useless. But the grant of freedom could not make the slave more than a latin (i, 18; Vlp. i, 12); as a latin he could not enter to the inheritance; and until he had entered he could not be free.

The case, so far as appears from the text, was not one directly met by the Aelia-Sentian law, which, however, expressly authorised such enfranchisement and manumission by an *insolvent* testator (i, 21; Vlp.

i, 14). It may have been for the purpose of authoritatively negating the idea that a *solvent* testator might follow the same course that a senatusconsult was considered necessary.

Exactly the same rule as is here laid down was applied where a slave instituted heir with freedom was only in *bonis* of the testator (Vlp. xxii, 8); and the reason given is the same as is here suggested—*quia latinitatem consequitur, quod non proficit ad hereditatem capiendam*.

§ 277. Comp. § 184.

§ 278. Comp. Vlp. xxv, 12. What is meant is this,—that while in actions for legacies the magistrate, according to the usual procedure,

lam<sup>1</sup> petimus: fideicommissa uero Romae quidem apud consulem uel apud eum praetorem qui praecipue de fideicommissis ius dicit<sup>2</sup> persequimur; in prouinciis uero apud praesidem prouinciae.

279 Item de fideicommissis semper in urbe ius dicitur; de legatis

280 uero cum res aguntur. Fideicommissorum usurae et fructus debentur, si modo moram solutionis fecerit qui fideicommissum debebit; legatorum uero usurae non debentur: idque rescripto diui Hadriani significatur. scio tamen Iuliano<sup>1</sup> placuisse in eo legato quod sinendi modo relinquitur<sup>2</sup> idem iuris esse quod in fideicommissis; quam sententiam et his

281 temporibus magis optinere uideo. Item legata Graece

282 scripta non ualent; fideicommissa uero ualent. Item si legatum per damnationem<sup>1</sup> relictum heres infitietur, in duplum

but in Rome we sue for trust-gifts before the consul or the praetor who is specially charged with jurisdiction in matter

279 of trusts, and in the provinces before the governor. Further, in Rome itself judicial proceedings regarding trusts may go on at any time; but those regarding legacies can go on only

280 during term. Interest and fruits and profits are due upon a trust-gift if the debtor be *in mora* in paying it, but interest is not due upon legacies; so it is stated in a rescript of our late emperor Hadrian's. I am aware, however, that Julian thought the rule to be the same in the case of a legacy bequeathed *sinendi modo* as in that of a trust-gift; and I observe

281 that his opinion is now generally adopted. Further, legacies bequeathed in Greek words are not valid, but trust-

282 gifts are. Further, if an heir deny that a legacy has been left by damnation, the action against him is for double the

sent an issue (*formula*) to a judge (*iudex*) for trial, in those for trust-gifts the procedure was from first to last before the consul, fideicommissary praetor, or provincial governor, without any remit to a *iudex*.

<sup>1</sup> See iv, §§ 30, 39, f.

<sup>2</sup> Comp. § 1, I. *de fid. hered.* (ii, 23); Pomp. in fr. 2, § 32, *de O. I.* (i, 2).

§ 279. Augustus fixed two law terms, a summer and winter one; Claudius is said to have combined them, leaving December and January entirely free, and giving frequent holidays, especially at the seasons of harvest and vintage; Galba

amended his scheme; and later the matter was regulated by an Oration of Marc. Aurelius', which prolonged the year's sittings to 230 days and rearranged the vacations (Capitolin. *Marc.* 10).

§ 280. Paul. held that interest was due on legacies as well as trust-bequests, iii, 8, § 4; so did Vlp. in fr. 34, D. *de usur.* (xxii, 1).

<sup>1</sup> See § 218, note 2.

<sup>2</sup> See § 209.

§ 281. Comp. Vlp. xxv, 9.

§ 282. Comp. iv, §§ 9, 171; Paul. i, 19, § 1; § 7, I. *de obl. quae q. ex contr.* (iii, 27).

<sup>1</sup> See § 201.

cum eo agitur; fideicommissi uero nomine semper in simplum persecutio est. Item quod quisque ex fideicommisso plus debito per errorem soluerit repetere potest, at id quod ex causa falsa per damnationem legati plus debito solutum sit repeti non potest. idem scilicet iuris est de eo legato quod non debitum uel ex hac uel ex illa causa per errorem solutum fuerit.

Erant etiam aliae differentiae quae nunc non sunt: ut ecce peregrini poterant *fideicommissa capere, et fere*<sup>1</sup> haec fuit origo fideicommissorum: sed postea id prohibitum est; et nunc ex oratione diui Hadriani senatusconsultum factum est ut ea fideicommissa fisco uindicarentur. Caelibes quoque qui per legem Iuliam<sup>1</sup> hereditates<sup>2</sup> legataque capere prohibentur, olim fideicommissa uidebantur capere posse. Item orbi, qui per legem Papiam<sup>1</sup> [ob id quod liberos non habebant]<sup>2</sup> dimidias partes hereditatum legatorumque perdunt,

amount of it; but for a trust-gift action is always *in simplum*. Further, there may be repetition of anything paid by mistake beyond what was due under a trust; but what has been paid upon some erroneous ground in excess of what is due under a legacy by damnation cannot be recovered. The rule is the same in regard to a legacy which, though not due at all, has, from some cause or other, been paid by mistake.

There used to be other differences, which do not now exist. For instance, peregrins used to be able to take trust-gifts,—in fact, this may almost be said to have been the origin of them; but afterwards this was prohibited; and now, by a senatusconsult passed at the instance of our late emperor Hadrian, such *fideicommissa* are to be claimed for the fisc. Celibates, too, who were forbidden by the Julian law to take inheritances or legacies, were yet in former times regarded as qualified to take trust-gifts. Further, childless persons, who by the Papian law, and because they have no children, forfeit one-half of their inheritances and legacies, were for-

§ 283. Comp. Vlp. xxiv, 33; Paul. iii, 6, § 2; § 7, I. *de obl. quae q. ex contr.* (iii, 27).

§ 284. Comp. § 268.

§ 285. Comp. i, 25; ii, §§ 110, 118; Vlp. xx, §§ 14, 15; xxii, 2; Th. ii, 23, § 1.

<sup>1</sup> The ms. has *fidem commissam facere et ferre*, etc.

§ 286. Comp. §§ 111, 144; Vlp. xvii, 1; xxii, 3; Constantin. in l. un. C.

Th. *de infirm. poen. caelib. et orb.* (viii, 16).

<sup>1</sup> See i, 145, note 1.

<sup>2</sup> After *Iuliam* the ms. has apparently *nas*; Hu. thinks this should be *ttas*, and accordingly interpolates *testamentarias* before *hereditates*.

§ 286a. See refs. in last note.

<sup>1</sup> See i, 145, note 1.

<sup>2</sup> P. deletes these words as a gloss, which K. u. S. also esteem them.



- olim solida fideicommissa uidebantur capere posse. sed postea senatusconsulto Pegasiano<sup>3</sup> proinde fideicommissa quoque ac legata hereditatesque capere *pro semisse*<sup>4</sup> prohibiti sunt; eaque translata sunt ad eos qui [*in eo*]<sup>5</sup> testamento liberos habent, aut si nullus liberos habebit ad populum, sicuti iuris est in legatis et in hereditatibus quae eadem aut simili ex causa
- 287 [*caduca fiunt*].<sup>6</sup> Item olim incertae personae uel postumo alieno per fideicommissum relinqui poterat, quamuis neque heres institui neque legari ei posset; sed senatusconsulto quod auctore diuo Hadriano factum est idem in fideicommissis
- 288 quod in legatis hereditatibusque constitutum est. Item poenae nomine iam non dubitatur nec per fideicommissum quidem relinqui posse.
- 289 Sed quamuis in multis iuris partibus longe latior causa sit fideicommissorum quam eorum quae directo relinquuntur, in quibusdam tantumdem ualeant, tamen tutor non aliter testa-

- merly considered qualified to take trust-gifts in full. But latterly, by the Pegasian senatusconsult, they are as much forbidden to take trust-gifts beyond a half as inheritances and legacies; the lapsed portion is now transferred to those persons named in the testament who have children, or, if there be none such, to the state, as is the rule in regard to legacies and inheritances which for that or any similar reason *become*
- 287 *caducous*. Further, it was formerly possible to bequeath by trust to an uncertain person or a stranger after-born, although it was impossible either to institute him heir or leave him a legacy; but, by a senatusconsult passed at the instance of our late emperor Hadrian, the rule has been made the same
- 288 for trust-gifts as for legacies and inheritances. Further, there is now no doubt that even a trust-gift cannot be bequeathed by way of penalty.
- 289 But although in many of their jural characteristics trust-gifts are not so circumscribed as direct bequests, while in other respects the two are equally effectual, yet a tutor cannot

<sup>3</sup> Comp. § 254.

<sup>4</sup> So P.; the ms. has *p'sem*, which most eds. render *posse*.

<sup>5</sup> *In eo* added by P.

<sup>6</sup> *Caduca fiunt* added by P. Previous eds. (as does Hu. still) made § 286a end with *hereditatibus*, and the next one begin—[*cum*] *que eadem aut simili ex causa item olim*, etc.

§ 287. Comp. §§ 238, 241; Vlp. xxii, 4; xxv, 13; § 12, I. *de hered. inst.* (ii, 14).

§ 288. Comp. §§ 235 f., 243; Vlp. xxv, 13.

§ 289. Comp. i, 149; Vlp. in fr. 3, § 1; Paul. in fr. 7, D. *de test. tutela* (xxvi, 2).

(3) It is possible that Pegasianus is a mistake for Plancianus, see Vlp. xxv, 17. n. 3, & that it is the same ScP, as referred to in § 285. (H. 436)

mento dari potest quam directo, ueluti hoc modo: LIBERIS MEIS TITIVS TVTOR ESTO, uel ita: LIBERIS MEIS TITIVM TVTOREM DO; per fideicommissum uero dari non potest.

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be appointed by testament otherwise than directly, for example thus: 'Be Titius tutor to my children,' or, 'I make Titius tutor to my children;' he cannot be appointed fideicommissarily.

## [COMMENTARIVS TERTIVS.]

- 1 [Intestatorum hereditates ex lege XII tabularum<sup>1</sup> primum ad  
 2 [suos heredes<sup>2</sup> pertinent. Sui autem heredes existimantur  
 [liberi qui in potestate morientis fuerunt, ueluti filius filiaue,  
 [nepos neptisue ex filio, pronepos proneptisue ex nepote filio nato  
 [prognatus prognataue: nec interest naturales sint liberi an  
 [adoptiui: ita demum tamen nepos neptisue et pronepos pro-  
 [neptisue suorum heredum numero sunt si praecedens persona  
 [desierit in potestate parentis esse, siue morte id acciderit siue  
 [alia ratione, ueluti emancipatione; <sup>1</sup> nam si per id tempus

- 1 The inheritances of intestates, by the law of the Twelve Tables,  
 2 belongs in the first place to sui heredes. Those are held to  
 be sui heredes who were in the potestas of the deceased at his  
 death,—a son or daughter for instance, a grandson or grand-  
 daughter, or a great-grandson or great-granddaughter by a  
 grandson who was the issue of a son; and it is quite immaterial  
 whether they be children by birth or by adoption. As regards  
 grandson and granddaughter, great-grandson and great-grand-  
 daughter, however, they are reckoned sui heredes then only when  
 the person next before them has ceased to be in the potestas of the  
 common parent, whether this have happened by death or other-  
 wise, say by emancipation; for if, at the moment of a man's

§§ 1-8. Comp. tit. I. DE HEREDITATI-  
 BVS QVAE AB INTESTATO DEFERVN-  
 TVR (iii, 1).

§§ 1-5. A sheet of the MS. is lost, cut  
 out, as is supposed, by the scribe  
 who overlaid the parchment with  
 Jerome's Epistles. The first side  
 probably was blank; the contents  
 of the second, down to the middle  
 of § 5, are supplied from the *Collat.*  
 xvi, 2, §§ 1-5, which bear expressly  
 to be from the Inst. of Gai. It is  
 not improbable that they were pre-  
 ceded by a par. corresponding to the  
 pr. of tit. I. afd., introducing the  
 subject of intestacy.

§ 1. § 1, tit. I. afd. Comp. Vlp. xxvi,  
 1; Paul. in *Collat.* xvi, 3, § 3.

<sup>1</sup> 'Si intestatus moritur, cui suus  
 heres nec escit, agnatus proximus  
 familiam habeto,' Schoell, *Tab.* v, 4.

<sup>2</sup> For the reason why the *sui*  
*heredes* were so called, see ii, 157.  
 Poste calls them self-heirs; but this  
 phrase, though with terseness and  
 accuracy describing their position,  
 is not sufficiently self-explanatory  
 for general use.

§ 2. §§ 2, 2b, tit. I. afd. Comp. Vlp.  
 xxvi, 1; Paul. in *Collat.* xvi, 3,  
 §§ 4, 8.

<sup>1</sup> Comp. i, 132.

- [quo quis moritur filius in potestate eius sit, nepos ex eo suus  
[heres esse non potest. idem et in ceteris deinceps liberorum  
3 [personis dictum intellegemus. Vxor quoque quae in manu  
[morientis est sua heres est, quia filiae loco est; item nurus  
[quae in filii manu est, nam et haec neptis loco est: sed ita  
[demum erit sua heres si filius, cuius in manu fuerit, cum pater  
[moritur in potestate eius non sit. idemque dicemus et de ea  
[quae in nepotis manu matrimonii causa<sup>1</sup> sit, quia proneptis  
4 [loco est. Postumi quoque qui, si uiuo parente nati essent, in  
5 [potestate eius futuri forent, sui heredes sunt. Idem iuris est  
[de his quorum nomine ex lege Aelia Sentia uel ex senatuscon-  
[sulto post] mortem patris causa probatur: nam et hi uiuo  
6 patre causa probata in potestate eius futuri essent. Quod  
etiam de eo filio qui ex prima secundaue mancipatione post  
mortem patris manumittitur intellegemus.  
7 Igitur cum filius filiae et ex altero filio nepotes neptesue

- death, his son be in his potestas, a grandson by that son cannot  
be his suus heres. The same remark applies to the rest of a man's  
3 descendants in their order. The wife, too, that is in his manus  
when he dies, is a sua heres, because she is in the position of a  
daughter. So is his daughter-in-law in his son's manus, for  
she stands to him in place of a granddaughter; she will be sua  
heres, however, only if the son, in whose manus she has been, was  
not in potestate of his father at the moment of the latter's death.  
The same may be said of her who is matrimonially in manu of  
a grandson; for she stands in the position of a great-grand-  
4 daughter. Posthumous children also who, had they been born  
in the lifetime of the parent [whose succession is in question],  
5 would have been in his potestas, are sui heredes. Those  
are in the same position on whose account cause of ~~error~~ has been  
proved under the Aelia-Sentian law or under the senatusconsult  
after their father's death; for, had it been proved during the  
6 latter's lifetime, they would have been in his potestas. And  
a son who, after a first or second mancipation, has been  
manumitted after his father's death, is also to be regarded as  
in the same position.

- 7 When therefore a man leaves a son or daughter, and  
§ 3. Comp. i, 136; ii, §§ 139, 159; Vlp. § 6. Gai. in Collat. xvi, 2, § 6. Comp.  
xxii, 14; Gell. xviii, 6, § 9. i, 132; ii, 141; Vlp. xxiii, 3; Paul.  
<sup>1</sup> Comp. i, §§ 114, 118. in Collat. xvi, 3, § 7. Manumission  
§ 4. § 2b, tit. I. afd. Comp. ii, 130; after a third mancipation would not  
Vlp. xxii, 15. have had the same effect.  
§ 5. Comp. i, §§ 29, 31, 32; ii, 142; Vlp. §§ 7, 8. Gai. in Collat. xvi, 2, §§ 7, 8;  
vii, 4; Paul. in Collat. xvi, 3, § 7. § 6, tit. I. afd. Comp. Vlp. xxvi, 2.



extant, pariter ad hereditatem uocantur; nec qui gradu proximior est ulteriorem excludit: aequum enim uidebatur nepotes neptesue in patris sui locum portionemque succedere. pari ratione et si nepos neptisue sit ex filio, et ex nepote pronepos proneptisue, simul omnes uocantur ad hereditatem.

8 Et quia placebat nepotes neptesue, item pronepotes proneptesue in parentis sui locum succedere, conueniens esse uisum est non in capita sed in stirpes hereditatem diuidi, ita ut filius partem dimidiam hereditatis ferat, et ex altero filio duo pluresue nepotes alteram dimidiam; item si ex duobus filiis nepotes extent, et ex altero filio unus forte uel duo, ex altero tres aut quattuor, ad unum aut ad duos dimidia pars pertineat, et ad tres aut quattuor altera dimidia.

9 Si nullus sit suorum heredum, tunc hereditas pertinet ex  
10 eadem lege XII tabularum<sup>1</sup> ad agnatos. *Vocantur autem agnati qui legitima cognatione iuncti sunt: legitima autem*

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grandsons or granddaughters by another son, they are called simultaneously to the inheritance; the nearer in degree does not exclude the more distant; for it seemed but fair that the grandsons and granddaughters should succeed in their father's place and to his share. Upon the same principle, if there be a grandson or granddaughter by a son, and a great-grandson or great-granddaughter by a grandson, they are all called simultaneously.

8 And as it was thought right that grandsons and granddaughters, great-grandsons and great-granddaughters, should succeed in the place of their parents, it seemed to accord with this view that the inheritance should be divided *in stirpes* rather than *in capita*, [*i.e.* by reckoning branches rather than individuals,] so that a son should have one half of the inheritance, and the grandsons by another son, whether two or more, should have the other half. So, if there be grandsons, issue of two sons,—one or perhaps two by one of them, three or four by the other, one half belongs to the one or two, and the other half to the three or four.

9 If there be no *suus heres*, then, by the same law of the Twelve Tables, the inheritance belongs to the agnates.

10 Those are called agnates who are allied by *legitima cognatio*,

§§ 9-17. Comp. tit. I. *DE LEGITIMA AGNATORVM SVCCESIONE* (iii, 2).

§ 9. Gai. in *Collat.* xvi, 2, § 9. Comp. Vlp. xxvi, 1; Paul. in *Collat.* xvi, 3, § 13; pr. tit. I. *afid.*

<sup>1</sup> See note 1 to § 1.

§ 10. Gai. in *Collat.* xvi, 2, § 10, from which the few words illegible in the ms. are supplied; § 1, tit. I. *afid.* Comp. Vlp. xxvi, 1; Paul. in *Collat.* xvi, 3, §§ 13, 15; Vlp. in *Collat.* xvi, 6, § 1.

cognatio est ea quae per uirilis sexus personas (*coniungitur*: *itaque eodem*) patre nati fratres agnati (*sibi sunt, qui etiam* (*consanguinei*) uocantur, nec requiritur an etiam matrem eandem habuerint; item patruus fratris filio et inuicem is illi agnatus est; eodem numero sunt fratres patruales inter se, id est qui ex duobus fratribus progenerati sunt, quos plerique etiam consobrinos<sup>1</sup> uocant: qua ratione *scilicet etiam ad* plures gradus agnationis peruenire poterimus.

11 Non tamen omnibus simul agnatis dat lex XII tabularum hereditatem, sed his *qui tunc*<sup>1</sup> cum certum est aliquem in-  
12 testato decessisse proximo gradu sunt. Nec in eo iure successio est: ideoque si agnatus proximus hereditatem omiserit, *uel antequam adierit* decesserit, sequentibus nihil iuris  
13 ex lege competit. Ideo autem non mortis tempore quis (*proximus*) fuerit requirimus, sed eo tempore quo certum

[i.e. the kinship of the *ius ciuile*;] and that is *legitima cognatio* in which the alliance is through persons of the male sex. Therefore brothers born of the same father, *often called brothers-consanguinean*, are each other's agnates, without reference to the consideration whether or not they have the same mother; an uncle on the father's side is an agnate of his brother's son, and the latter in turn an agnate of his uncle; agnates also, each of the other, are *fratres patruales*, i.e. the children of two brothers, by most people called *consobrini*. It is plain that in this way we may arrive at many degrees of agnation.

11 It is not, however, to all a man's agnates at once that the Twelve Tables give his inheritance, but only to those who are nearest in degree at the time it has been ascertained that  
12 he has died intestate. Nor is there any succession in this right of the nearest agnate; consequently if he have not taken up the inheritance, or have died before entry, those  
13 next in degree have no claim to it under the statute. The reason why we seek for the nearest agnate, not as at the time of a man's death, but as at the time when it has been ascer-

<sup>1</sup> *Consobrini* originally meant children of sisters, but was extended so as to mean first cousins without distinction.  
§ 11. Gai. in *Collat.* xvi, 2, § 11; § 1, tit. I. afd. Comp. § 13; Paul. in *Collat.* xvi, 3, § 17; § 6, tit. I. afd.  
<sup>1</sup> The ms. seems to have *quibus* tum; corrected from *Collat.* and Inst.  
§ 12. Gai. in *Collat.* xvi, 2, § 12. Comp. § 22; Vlp. xxvi, 5; Paul. iv, 8, §§ 23, 26; § 7, tit. I. afd.  
§ 13. Gai. in *Collat.* xvi, 2, § 13, from which the few words illegible in the ms. have been supplied. Comp. § 11; § 6, tit. I. afd.

fuerit aliquem intestatum decessisse, quia si quis (*testamento*) facto decesserit, melius esse uisum est tunc *eius*<sup>1</sup> requiri proximum cum certum esse coeperit neminem ex eo testamento fore heredem.

- 14 Quod ad feminas tamen attinet, in hoc iure aliud in ipsarum hereditatibus capiendis placuit, aliud in ceterorum bonis<sup>1</sup> ab his capiendis: nam feminarum *hereditates* proinde ad nos agnationis iure redeunt atque masculorum, nostrae uero hereditates ad feminas ultra consanguineorum gradum non pertinent; itaque soror fratri sororiue legitima heres est, amita uero et fratris filia legitima heres esse [*non [potest; sororis autem nobis loco est]*] etiam mater aut nouerca quae per in manum conuentionem apud patrem nostrum iura filiae *nacta*<sup>2</sup> est.

- 15 Si ei qui defunctus erit sit frater et alterius fratris filius, sicut ex superioribus<sup>1</sup> intellegitur, frater prior<sup>2</sup> est, quia

tained that he has died intestate, is this,—that, if he died leaving a testament, the proper course seemed to be to look for the agnate nearest to him at the moment it became certain that no one was to be heir under that testament.

- 14 As regards women, one rule has been received in this branch of the law as to taking an inheritance from them, but quite a different one as to taking by them; for, while the inheritances of females devolve on us by right of agnation just as do those of males, our inheritances do not belong to females beyond the consanguinean degree. Therefore, while a sister is heir-at-law of her brother or sister, a father's sister or a brother's daughter *cannot be* heir-at-law [of her nephew or uncle]. A mother or stepmother, however, who by passing *in manum* of our father has acquired the rights of a daughter of his, *stands to us in the position of a sister*.

- 15 If a person deceased be survived by a brother and the son of another brother, the brother, as may be gathered from

<sup>1</sup> So P.; the ms. appears to have *etiis*, which Hu. renders *ex iis*, and K. u. S. omit.

§ 14. Gai. in *Collat.* xvi, 2, § 14, from which the words [*non . . . loco est*], omitted in the ms. are supplied. Comp. Vlp. xxvi, 6; Paul. in *Collat.* xvi, 3, §§ 16, 20; Vlp. in *Collat.* xvi, 7, § 1; §§ 3, 3a, 3b, tit. I. afd.

<sup>1</sup> This word omitted by many eds. as a gloss, on the ground that it would hardly be applied by a classical jurist to a *legitima hereditas*;

but we find Gai. frequently—as in §§ 36 f.—using *hereditas* for *bonorum possessio*, which in strictness is equally inaccurate.

<sup>2</sup> The ms. has *nacta*; Hu., following the *Collat.*, substitutes *consecuta*.

§ 15. Gai. in *Collat.* xvi, 2, § 15. Comp. Paul. in *Collat.* xvi, 3, § 18; § 5, tit. I. afd.

<sup>1</sup> See § 11.

<sup>2</sup> So the ms.; the *Collat.* and Inst. have *potior*, which K. u. S. adopt.

- gradu praecedit: sed alia facta est iuris interpretatio inter  
 16 suos heredes.<sup>3</sup> Quodsi defuncti nullus frater extet, [*scil*]  
 sint liberi fratrum, ad omnes quidem hereditas pertinet; sed  
 quaesitum est, si dispari forte numero sint nati, ut ex uno  
 unus uel duo, ex altero tres uel quattuor, utrum in stirpes  
 diuidenda sit hereditas, sicut inter suos heredes iuris est,  
 an potius in capita: iam dudum tamen placuit in capita  
 diuidendam esse hereditatem; itaque quotquot erunt ab  
 utraque parte personae, in tot portiones hereditas diuidetur,  
 ita ut singuli singulas portiones ferant.
- 17 Si nullus agnatus sit, eadem lex XII tabularum<sup>1</sup> gentiles<sup>2</sup>  
 ad hereditatem uocat. qui sint autem gentiles primo com-  
 mentario<sup>3</sup> rettulimus; et cum illic admonuerimus totum  
 gentilicium ius in desuetudinem abisse, superuacuum est hoc  
 quoque loco de eadem re curiosius<sup>4</sup> tractare.

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what has been said, is preferred, for he is nearer of degree;  
 but a different interpretation is put upon the law in the case  
 16 of *sui heredes*. If he leave no brother, but is survived by  
 children of brothers predeceased, the inheritance belongs to  
 all of them. It used to be a question, when the families  
 were of unequal number,—one brother having one or two  
 children say, another three or four,—whether the inheritance  
 should be divided *in stirpes*, as is the rule with *sui heredes*,  
 or *in capita*. It has long been settled, however, that the  
 division must be *in capita*; therefore, whatever be the number  
 of individuals in the two families collectively, the inheritance  
 must be divided into the same number of shares, so that each  
 individual may have one.

- 17 On failure of agnates, the gentiles, by the same law of  
 the Twelve Tables, are called to the inheritance. Who the  
 gentiles are we have explained in our First Commentary; it  
 would be superfluous again to go into the details of the  
 matter, seeing, as there already observed, that the whole law  
 affecting them has become obsolete.

<sup>3</sup> Comp. § 8.

§ 16. Gai. in *Collat.* xvi, 2, § 16. Comp.  
 Vlp. xxvi, 4; Paul. in *Collat.* xvi,  
 3, §§ 17, 19; § 4, tit. I. afd.

§ 17. Comp. Vlp. in *Collat.* xvi, 4,  
 § 2.

<sup>1</sup> 'Si agnatus nec escit, gentiles  
 familiam habento,' Schoell, *Tab.*  
 v, 5.

<sup>2</sup> Comp. Liv. x, 8; Cic. *Top.* vi,  
 29; Paul. *ex Festo*, v. *Gentilis*  
 (Bruns, p. 242).

<sup>3</sup> See i, 164a, note.

<sup>4</sup> Between *re* and *curiosius* the  
 ms. has *tin*, with a dot over the *n*,  
 usually a mark of deletion. Hu.  
 and many earlier eds. read *iterum*;  
 Gou. and P. *et*.



18 Hactenus lege XII tabularum finitae sunt intestatorum<sup>1</sup>  
 hereditates : quod ius quemadmodum strictum fuerit palam  
 19 est intellegere. Statim enim emancipati liberi nullum ius  
 in hereditatem parentis ex ea lege habent, cum desierint sui  
 20 heredes esse. Idem iuris est si ideo liberi non sint in  
 potestate patris quia sint cum eo ciuitate Romana donati nec  
 21 ab imperatore in potestatem redacti fuerint. Item agnati  
 capite deminuti non admittuntur ex ea lege ad hereditatem,  
 22 quia nomen agnationis capitis deminutione perimitur. Item  
 proximo agnato non adeunte hereditatem, nihilo magis sequens  
 23 iure legitimo admittitur. Item feminae agnatæ quaecum-  
 que consanguineorum gradum excedunt nihil iuris ex lege  
 24 habent. Similiter non admittuntur cognati qui per femi-  
 nini sexus personas necessitudine iunguntur, adeo quidem  
 ut nec inter matrem et filium filiamue ultro citroque here-  
 ditatis capiendae ius competat, praeterquam si per in

18 Here, according to the Twelve Tables, there was an end of  
 the inheritances of intestates ; and how strict the law was in  
 19 regard to them is very evident. Thus children the moment  
 they are emancipated have no longer any right under the  
 statute in the inheritance of their ancestor, for they have  
 20 ceased to be *sui heredes*. The rule is the same where  
 children happen not to be *in potestate* of their father for the  
 reason that, though they have received with him a gift of  
 citizenship, the emperor has not declared them subject to his  
 21 *potestas*. Further, agnates who have undergone *capitis*  
*deminutio* are by the statute excluded from the inheritance,  
 because agnation is thereby in every sense destroyed.  
 22 Further, if the nearest agnate fail to enter, the next in degree  
 is none the more on that account entitled to admission under  
 23 the statute. Further, female agnates beyond the consan-  
 24 guinean degree of relationship have no right under it. In  
 like manner those kinsmen are not admitted that are related  
 merely through females. So far does this go that, as between  
 a mother and her son or daughter, there is not on either  
 side any right to take an inheritance, except when consan-

§ 18. Comp. pr. I. *de SC. Tertull.* (iii, 3).

<sup>1</sup> After this word Hu. interpolates *ingenuorum*.

§ 19. Comp. § 9, I. *de hered. q. ab. int.* (iii, 1).

§ 20. Comp. i, §§ 93, 94 ; ii, 135a.

§ 21. Comp. i, 158 ; iii, 27 ; Vlp. xxvii, 5 ; § 1, I. *de succ. cognator.* (iii, 5).

§ 22. Comp. §§ 12, 28.

§ 23. Comp. § 14.

§ 24. Comp. Vlp. xxvi, §§ 7, 8 ; pr. I. *de SC. Tertull.* (iii, 3).

manum conuentionem consanguinitatis iura<sup>1</sup> inter eos constiterint.

- 25 Sed hae iuris iniquitates edicto praetoris emendatae sunt.  
 26 Nam eos omnes<sup>1</sup> qui legitimo iure deficiuntur uocat ad hereditatem<sup>2</sup> proinde ac si in potestate parentum mortis tempore fuissent, siue soli sint, siue etiam sui heredes, id est qui in  
 27 potestate patris fuerunt, concurrant. Agnatos autem capite deminutos non secundo gradu<sup>1</sup> post suos heredes uocat, id est non eo gradu uocat quo per legem uocarentur si capite minuti non essent, sed tertio, proximitatis nomine; (licet enim capitis deminutione ius legitimum perdiderint, certe cognationis iura retinent):<sup>2</sup> itaque si quis alius sit qui integrum ius agnationis habebit, is potior erit, etiamsi longiore

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guinity has been established between them by *in manum conuentio*.

- 25 But those inequalities of the *ius civile* have been corrected  
 26 by the praetor's edict. For he calls to the inheritance all descendants who have no statutory title, just as if they had been in the *potestas* of their ancestor at the time of his death; and that whether they stand alone, or whether *sui heredes*—persons, that is to say, who were actually *in potestate* of the  
 27 deceased parent—claim along with them. As for agnates who have undergone *capitis deminutio*, he does not call them in the second class immediately after the *sui heredes*,—he does not call them, that is to say, in that class in which they would have been called by the statute had they not been *capite minuti*, but in the third class, on the ground of propinquity; (for although by their *capitis deminutio* they have lost their statutory title, they still retain the rights of kinship.) If, therefore, there be any other person whose right as an agnate remains unimpaired, he will be preferred to them, even

<sup>1</sup> The rights arising from the relationship of brother and sister or of sisters; comp. § 14.

§ 25. A vacant line in the ms. before this par. Comp. pr. § 2, I. *de bonor. poss.* (iii, 9).

§§ 26-31. Comp. tit. I. *DE SVCCESIONE COGNATORVM* (iii, 5).

§ 26. Comp. §§ 19, 20; Vlp. xxviii, 8; Vlp. in *Collat.* xvi, 7, § 2; § 9, I. *de hered. q. ab. int.* (iii, 1); pr. tit. I. *afd.*

<sup>1</sup> So the ms. For *eos* G. and all

subsequent eds., except P., substitute *liberos*; but unnecessarily, as the context sufficiently limits the pronoun.

<sup>2</sup> Comp. § 32.

§ 27. Comp. § 21; Vlp. xxviii, 9; § 1, tit. I. *afd.*

<sup>1</sup> Here and in subsequent pars. there is a confusion between *gradus* and *ordo*; *sui*, *agnati*, *cognati*, were *ordines* rather than *gradus*.

<sup>2</sup> Comp. i, 158.

- 28 gradu fuerit.<sup>3</sup> Idem iuris est, ut quidam putant, in eius agnati persona qui proximo agnato omittente hereditatem nihilo magis iure legitimo admittitur; sed sunt qui putant hunc eodem gradu a praetore uocari quo etiam per legem
- 29 agnatis hereditas datur. Feminae certe agnatae quae consanguineorum gradum excedunt tertio gradu uocantur, id
- 30 est si neque suus heres neque agnatus ullus erit. Eodem gradu uocantur etiam eae personae quae per feminini sexus
- 31 personas copulatae sunt. Liberi quoque qui in adoptiua familia sunt ad naturalium parentum hereditatem hoc eodem gradu uocantur.
- 32 Quos autem praetor uocat ad hereditatem, hi heredes ipso quidem iure non fiunt: nam praetor heredes facere non (*potest; per legem enim tantum uel similem iuris constitu-*

- 28 though he be of a more distant degree. The rule is the same, as some think, in the case of the remoter agnate who, on the declinature of the inheritance by him who is nearest of degree, nevertheless is not on that account admitted by statutory right. There are others, however, who think that such a man is called by the praetor in the same class in which the inheritance goes by statute to the agnates.
- 29 Female agnates beyond the consanguinean degree are undoubtedly called in the third class; in the absence, that is
- 30 to say, of both *sui* and agnates. In the same class are called also such persons as are related through females.
- 31 Children, too, who are in an adoptive family, are called in this same class to the inheritance of their natural parents.
- 32 Those, however, whom the praetor calls to an inheritance do not become heirs *ipso iure*; the praetor cannot make men heirs,—*it requires a comitial enactment or some similar*

<sup>3</sup> For ex., a deceased brother's son, who was an agnate, would be preferred to a brother who, by *cap. deminutio*, had become only a cognate.

§ 28. Comp. §§ 12, 22; § 7, I. *de leg. agn. succ.* (iii, 2). According to the first view here suggested,—and which, as appears from § 7, I., referred to, eventually prevailed,—he would take only as a cognate, in concurrence with other cognates of the same degree, and might himself be excluded by cognates of nearer degree; according to the second, he

would take as an agnate, to the entire exclusion of cognates.

§ 29. Comp. § 23; Paul. iv, 8, § 22a; § 3, I. *de leg. agn. succ.* (iii, 2).

§ 30. Comp. § 24; Vlp. xxviii, 9; § 2, tit. I. *afid.*

§ 31. § 3, tit. I. *afid.*

§ 32. § 2, I. *de bonor. poss.* (iii, 9), from which the words in ital., mostly illegible in the ms., are supplied; for the ordinary contraction, however, of *praetor dat bonorum possessionem* (*prdatbp*), the ms. appears to Stud. to have *propter*. Comp. ii, 119, note 1; iii, § 80; Vlp. xxviii, 12.

(*tionem heredes fiunt*), ueluti per senatusconsultum et constitutionem principalem: sed *cum eis praetor dat bonorum possessionem*, loco heredum constituuntur.

33 (*Adhuc autem etiam*) alios complures gradus (*fecit praetor in bonorum possessionibus dandis, dum id agebat ne quis sine successore moreretur*). de quibus in his commentariis consulto (*non agimus, quia*) hoc ius totum propriis commentariis

33a *executi sumus.* (*Hoc*) solum admonuisse sufficit — — — — — in *manum conuentionem iura consanguinitatis nacta* — — — — —.

33b — — — — — . [34] (*Aliquando tamen neque*

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*statutory provision, such as a senatusconsult or imperial constitution, to do that. But as the praetor gives such persons possession of the deceased's estate, they are [practically] put in the position of heirs.*

33 *Various other classes of bonorum possessores have been created by the praetor in his anxiety to prevent persons dying without successors, which we purposely refrain from dealing with in these pages, seeing we have explained the whole of this branch of the law elsewhere in a special treatise. It is enough to observe* — — — — —.

33b [*Bonorum possessio was introduced by the praetor for the purpose of amending the old law. And it was not only in the case of the inheritances of intestates that he amended the old law in this way, as has been above described, but also in the case of those of persons who have left a testament. For, if a*

§ 33. The illegible words in the first sentence of this par. (p. 132, lines 6, 7 of the ms.) are supplied from § 2, I. *de bonor. poss.* (iii, 9). Those illegible in the second sentence are naturally suggested by the context.

§ 33a. This par. begins on line 10 of p. 132 of the ms. Of the fourteen lines that follow there is very little decipherable, while on p. 133 only a few letters can be made out. It is generally supposed that the first of these pages contained an account of the provisions of the Tertullian senatusconsult; in regard to which see tit. I. *de SC. Tertull.* (iii, 3), and Vlp. xxvi, 8. The Orphitian senatusconsult (I. iii, 4), though enacted during the lifetime of Gai., was probably posterior to his Institutes.

§ 33b. Assuming that § 34 stood in Gai. as printed in the text, i.e. as it

stands in § 1, I. *DE BONORVM POSSESSIONIBVS* (iii, 9), Huschke's conjecture seems more than probable that it may have been preceded by what we now have in the pr. of that title; indeed the initial *aliquando tamen* of § 34 necessitates it. The words of the pr. are: *Ius bonorum possessionis introductum est a praetore emendandi ueteris iuris gratia. Nec solum in intestatorum hereditatibus uetus ius eo modo praetor emendauit, sicut supra dictum est, sed in eorum quoque qui testamento facto decesserint. Nam si alienus postumus heres fuerit institutus, quamuis hereditatem iure civili adire non poterat, cum institutio non ualebat, honorario tamen iure bonorum possessor efficiebatur, uidelicet cum a praetore adiunabatur.* Comp. §§ 25 f.; ii, §§ 242, 287.



- 34 (*emendandi neque impugnandi ueteris iuris, sed magis confir-*  
*(mandi gratia pollicetur bonorum possessionem. nam illis*  
*(quoque), qui recte (facto testamento heredes instituti sunt, dat*  
*(secundum tabulas bonorum possessionem: item ab in)testato*  
*heredes suos et agnatos ad bonorum possessionem uocat.*  
*quibus casibus beneficium eius in eo solo uidetur aliquam*  
*utilitatem habere, ut is qui ita bonorum possessionem petit*  
*interdicto cuius principium est QVORVM BONORVM<sup>1</sup> uti possit:*  
*cuius interdicti quae sit utilitas suo loco proponemus: alio-*  
*quin remota quoque bonorum possessione ad eos hereditas*  
*pertinet iure ciuili.*
- 35 Ceterum saepe quibusdam ita datur bonorum possessio ut  
 is cui data sit [*non tamen ideo*]<sup>1</sup> optineat hereditatem; quae  
 36 bonorum possessio dicitur sine re. nam si uerbi gratia iure

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[*man have instituted a stranger after-born as his heir, the latter*  
 [*cannot enter to the inheritance according to the ius ciuile, the*  
 [*institution being invalid; but by the ius honorarium he*  
 [*becomes bonorum possessor, the praetor coming to his aid.*]

- 34 Sometimes, however, it is for the purpose neither of amending  
 nor of impugning, but rather of confirming the old law, that  
 the praetor promises possession of a deceased person's estate; for  
 he grants it in terms of the deed to those who have been insti-  
 tuted heirs under a regularly executed testament; while in the  
 event of intestacy he calls both *sui heredes* and agnates.  
 In such cases his grant seems to be useful only in this re-  
 spect,—that he who thus petitions for possession of the  
 estate can employ the interdict which begins with the  
 words '*Quorum bonorum*,' whose advantages we shall explain  
 in the proper place; but in any case, even were the *bonorum*  
*possessio* put out of view, the inheritance belongs to such  
 persons by the *ius ciuile*.

- 35 It frequently happens that *bonorum possessio* is given under  
 circumstances which prevent the grantee therewith obtaining  
 the [beneficial interest in the] inheritance; a possession of  
 this sort is said to be only nominal, *bonorum possessio sine re*.  
 36 Suppose, for example, that the heir instituted under a duly

§ 34. Ever since first suggested by G. there has been a general consensus of opinion that this par., begun on p. 133 and ended on p. 134, was, in the first half of it, the same as § 1, tit. I. afđ.; and I have given effect to this view by introducing the passage in the text as reasonably certain. Comp. Paul. in *Collat.* xvi, 3, § 5.

<sup>1</sup> Comp. iv, 144.

§ 35. Comp. ii, 148; Vlp. xxiii, 6; xxviii, 13.

<sup>1</sup> So P., and preferable to the simple *non* of other eds. The introduction of a negative is absolutely necessary.

§ 36. Comp. Vlp. xxviii, 13.

- facto testamento heres institutus creuerit<sup>1</sup> hereditatem, sed bonorum possessionem secundum tabulas testamenti petere noluerit, contentus eo quod iure ciuili heres sit, nihilo minus ii, qui nullo facto testamento ad intestati bona uocantur, possunt petere bonorum possessionem; sed sine re ad eos hereditas<sup>2</sup> pertinet, cum testamento scriptus heres euincere
- 37 hereditatem possit. Idem iuris est si intestato aliquo mortuo suus heres *noluerit petere bonorum possessionem, contentus legitimo iure*:<sup>1</sup> *nam*) et agnato competit quidem bonorum possessio, sed sine re, quia euinci hereditas a suo herede potest. et *conuenienter*,<sup>2</sup> si ad agnatum iure ciuili pertinet hereditas, et is adierit hereditatem sed bonorum possessionem petere noluerit, si quis<sup>3</sup> ex proximis cognatis petierit, sine re habebit bonorum possessionem propter eandem rationem.
- 38 Sunt et alii quidam similes casus, quorum aliquos superiore commentario tradidimus.

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- executed testament has declared his acceptance of the inheritance, but, content with his legal title of heir, has refrained from petitioning for possession of the estate in terms of the deed, those who are called *ab intestato* in the absence of a testament are entitled to demand *bonorum possessio*; but it will be theirs *sine re*, [*i.e.* without beneficial result,] seeing
- 37 the testamentary heir can evict. The law is the same when, on a man's death intestate, his *suus heres* has refrained from demanding *bonorum possessio*, content with his right under the statute; here again an agnate-heir may have *bonorum possessio*, but *sine re*, for the inheritance may be evicted by the *suus heres*. In the same way, if the inheritance belong by the *ius ciuile* to an agnate, and he have entered, but refrained from demanding *bonorum possessio*,—if this be claimed by one of the nearest cognates, the latter will
- 38 get it only *sine re*, for the same reason as before. There are other cases of the same sort, some of which have been mentioned in the immediately preceding Commentary.

<sup>1</sup> Comp. ii, §§ 164 f.

<sup>2</sup> *Hereditas* in this and subsequent pars. is occasionally used as meaning the deceased's estate,—the *bona* of which possession had been granted. See § 14, note 1.

§ 37. <sup>1</sup> The words *legitimo iure*, illegible except the initial *l*, are supplied by Hollweg, and justified by the context.

<sup>2</sup> The ms. has *illud conuenientur*; for which P. suggests *illud conuenienter inueniuntur*; K. (K. u. S. footnote), *illud conueniens inueniuntur*; and Hu., *illud conuenienter dicitur*.

<sup>3</sup> The ms. has *et si quis*; most eds. retain the *et*, Hu. reading *et sic quis*.

§ 38. Comp. ii, §§ 119, 148, 149.

39 Nunc de libertorum bonis uideamus. [40] Olim itaque  
 40 licebat liberto patronum suum inpune testamento praeterire:  
 nam ita demum lex XII tabularum ad hereditatem liberti  
 uocabat patronum, si intestatus mortuus esset libertus nullo  
 suo herede relicto: itaque intestato quoque mortuo liberto, si  
 is suum heredem reliquerat, nihil in bonis eius patrono iuris  
 erat; et siquidem ex naturalibus liberis aliquem suum here-  
 dem reliquisset, nulla uidebatur esse querella; si uero uel  
 adoptiuus filius filiaue, uel uxor quae in manu esset, [*suus uel*]  
 41 sua heres esset, aperte iniquum erat nihil iuris patrono super-  
 esse. Qua de causa postea praetoris edicto haec iuris ini-  
 quitas emendata est: siue enim faciat testamentum libertus,  
 iubetur ita testari ut patrono suo partem dimidiam bonorum  
 suorum relinquat, et si aut nihil aut minus quam partem dimi-  
 diam reliquerit, datur patrono contra tabulas testamenti partis  
 dimidiaae bonorum possessio;<sup>1</sup> si uero intestatus moriatur, suo

39 Let us see now about the estates of freedmen. [40] For-  
 40 merly a freedman might pass over his patron in his testament  
 with perfect impunity; for the law of the Twelve Tables  
 called a patron to the inheritance of his freedman then only  
 when the latter had died intestate leaving no *suus heres*.  
 Accordingly if a freedman dying intestate did leave a *suus*  
*heres*, his patron had no right in his estate, and if that *suus*  
*heres* was one of the freedman's natural children there was no  
 cause for complaint; if, however, it was either an adoptive  
 son or daughter, or his wife *in manu*, that was his *suus heres*,  
 then it was obviously unfair that no right should remain to  
 41 the patron. Accordingly this want of equity in the law  
 was afterward corrected by the praetor's edict. A freedman,  
 if he make a testament, is thereby required to do it in such a  
 way as to leave to his patron one-half of his estate; if he  
 have left him nothing, or less than a half, the patron may  
 obtain *bonorum possessio* of one-half of it contrary to the  
 terms of the testament. If the freedman die intestate, leav-

§§ 39-76. Comp. tit. I. *DE SVCCESIONE LIBERTORVM* (iii, 7). Before § 39 a line vacant in the MS., probably for a rubric.

§§ 39, 40. Pr. tit. I. *afid.* Comp. i, 165; Vlp. xxvii, 1; xxix, 1.

§ 41. § 1, tit. I. *afid.*, from which the words in italics, illegible in the

MS., are supplied. Comp. Vlp. xxix, 1.

<sup>1</sup> This is not to be taken absolutely; for, as appears from the end of the par., a testament made in favour of his children by birth by a freedman who was not a *centenarius* (§ 42), was free from challenge by his patron.

herede relicto adoptiuo filio, uel uxore quae in manu ipsius esset, uel nuru quae in manu filii eius fuerit, datur aequè patrono aduersus hos suos heredes partis dimidia bonorum possessio. prosunt autem liberto ad excludendum patronum naturales liberi, non solum quos in potestate mortis tempore habet sed etiam emancipati et in adoptionem dati, si modo aliqua ex parte heredes scripti (*sint, aut praeteriti contra*) tabulas testamenti bonorum possessionem ex edicto petierint :  
 42 nam exheredati nullo modo repellunt patronum. Postea lege Papia <sup>1</sup> aucta sunt iura patronorum quod ad locupletiores libertos pertinet : cautum est enim ea lege, ut ex bonis eius qui sestertiorum (*centum milium plurisue*) <sup>2</sup> patrimonium reliquerit, et pauciores quam tres liberos habeat, siue is testamento facto siue intestato mortuus erit, uiril pars patrono debeatur ; itaque cum unum filium unamue filiam heredem reliquerit libertus, perinde pars dimidia patrono debetur ac si sine ullo filio filiae moreretur ; cum uero duos duasue here-

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ing as his *suus heres* either an adoptive son, or the wife who had been in his *manus*, or a daughter-in-law who had been *in manu* of his son, the patron is equally entitled to possession of a half of the estate in opposition to those *sui heredes*. Not only, however, will those of his children by birth avail the freedman to exclude his patron who were in his *potestas* at his death, but also those he had emancipated or given in adoption, provided they have either been instituted to a share of his inheritance, or, *having been passed over*, have petitioned under the edict for *bonorum possessio* contrary to the tenor of the will ; but those who have been disinherited by no means  
 42 exclude the patron. The rights of patrons having very wealthy freedmen were afterwards enlarged by the Papian law. By that enactment it was provided that, of the estate of a freedman who left a fortune of or over a hundred thousand sesterces and fewer than three children, and whether he died testate or intestate, one equal share should go to the patron. Accordingly if a freedman have left one son or one daughter as his heir, a half of his estate is due to his patron, just as if he had died without any child ; but if he have left two sons

§ 42. § 2, tit. I. afd.

<sup>1</sup> See i, 145, note.

<sup>2</sup> Of those three words only the letters *mili* are distinct in the ms.,

with room for about twenty more. *Centum milium* are from the Inst., and *plurisue* will about fill the remaining space.



des reliquerit tertia pars debetur, si tres relinquat repellitur patronus.

- 43 In bonis libertinarum nullam iniuriam antiquo iure patiebantur patroni: cum enim hae in patronorum legitima tutela essent, non aliter scilicet testamentum facere poterant quam patrono auctore. itaque *si ei*<sup>1</sup> auctor ad testamentum faciendum factus erat, — — — — —<sup>2</sup> factus erat, *sequebatur* hereditas; si uero auctor ei *factus* non erat, et *intestata liberta moriebatur*, ad — — — — — posset  
44 patronum a bonis *libertae* — — repellere.<sup>3</sup> Sed postea

or daughters as his heirs, only a third part is due; while if he have left three the patron is altogether excluded.

- 43 As regards the estates of their freedwomen, patrons suffered no injury by the old law; for as the former were under the tutory-at-law of the latter, they could not otherwise make a testament than *patrono auctore*. Therefore if a patron had interposed his authority to a testament made by his freedwoman, [*either he had himself to blame if he had not therein [been named heir, or, if he had been so named]*], he took the inheritance under the will; if, on the other hand, he had not interposed his *auctoritas*, or she had died intestate, [*the inheritance belonged to him as patron, a woman having no sui [heredes; so that it is impossible to conceive a case]* in which a patron could be kept out of the succession of his freedwoman  
44 *against his will*. But afterwards the Papian law, in liber-

§ 43. Before this par. a vacant line. Comp. i, 192; Vlp. xxix, 2.

<sup>1</sup> The ms. and all eds. have *sive* instead of *si ei*.

<sup>2</sup> The first 2 lines of p. 137 mostly illegible. Krueger's reconstruction (*Krit. Vers.* p. 132) has been generally approved; it runs—*aut de se queri debebat quod heres ab ea relictus non erat, aut ipsum ex testamento, si heres factus erat*, etc.

<sup>3</sup> The greater part of lines 5-7 are illegible. Krueger (*Krit. Vers.* p. 132) reconstructs thus: *quia suos heredes femina habere non potest, ad patronum pertinebat, nec cogitari ullus casus poterat quo quis posset patronum a bonis libertae inuitum repellere*. Hu. proposes: *ad eundem, quia suos heredes femina habere non potest, hereditas pertinebat: nec cogitari ullus heres poterat, qui iure civili posset patronum a bonis li-*

*bertae inuitum repellere*. Krueger's seems the preferable reading, with this emendation,—that *ad patronum* should go before *quia*, etc., the *ad* appearing in the ms. after *moriebatur*.

§ 44. Comp. i, 145, note; i, 194; iii, 47; Vlp. xxix, §§ 2, 3. The par., which is on lines 8-17 of p. 137, is to a considerable extent illegible. The first lacuna in the text may very well be filled with *condere testamentum, prospexit*, and the second with *quos liberta mortis tempore*, both as proposed by K. (*Krit. Vers.* p. 133), and justified by Vlp. xxix, 3. The third K. fills thus, Hu. substantially adopting his reading: *eique ex bonis eius quae C milium sestertiorum plurisue reliquerit patrimonium, si testamentum fecerit, dimidia pars debeatur; si uero intestata liberta decessit, tota hereditas ad*

lex Papia, cum quattuor liberorum iure libertinas tutela patronorum liberaret, et eo modo concederet *eis* etiam sine tutoris auctoritate — — — — ut pro numero liberorum — — — — habuerit, uirilis pars patrono debeatur, *eique* ex bonis eius, quae — — — — hereditas ad patronum pertinet.

45 Quae diximus de patrono eadem intellegemus et de filio

ating freedwomen enjoying the privilege of four children from the tutelage of their patrons, and thus conceding to them the power of *executing a testament* without their tutor's authority, [*provided that a share of a freedwoman's inheritance, [varying according to the number of children by whom she was [survived, should still be due to her patron. — — — — — . [If, however, she die intestate, the whole]* inheritance belongs to the patron.

45 What has been said of a patron applies equally to his son,

patronum pertinet. M. (K. u. S. p. xxi) proposes: *scilicet ex bonis eius quae centum milium sestertium plurisue substantiam habeat. nam si minoris ea fuerit, non nisi ab intestato hereditas ad patronum pertinet.* But neither of those conjectural readings seems to be justified by the letters Stud. has deciphered; for the *c milium sestertiorum plurisue*, Stud. has *omnia...dorideiuris*, and for the other words letters equally inappropriate.

I find no warrant for the assumption that the Papian law applied any special rule to the case of a freedwoman who had a fortune of 100,000 sesterces or more. A patron was entitled to a share of the estate of a *libertus centenarius*,—a freedman who left a fortune of that amount, whether he died testate or intestate, provided he left *no more than two children* (§ 42). But if a *freedwoman*, whatever her fortune, died intestate, her patron was her heir-at-law, however numerous her children; while it was not unless she had *four children* at least that she could at her own hand make a testament and thereby prejudice her patron's right.

The position of matters under the Papian amendment seems to have been this: If a freedwoman had

fewer than four children she continued incapable of making a testament without her patron's *auctoritas*; but the moment her fourth child was born she was freed from tutelage, and might at any time thereafter, and even though her children had all died in the interval, make a testament entirely at her own hand. If she died intestate, her patron took everything as heir-at-law; for, even if she had children, they were not *sui heredes*, and so could not exclude him. If she left a will, she could not thereby defeat her patron's right to a share at least of her estate as *portio legitima*; for, whatever the nature of her testamentary arrangements,—whether she left her fortune to her children or to strangers,—he was entitled to a share which, if not left to him directly, he might obtain by a grant of *bonor. possessio*. And this share varied according to the number of children, whether instituted or not, by whom she was survived; if three, say, he was entitled to a fourth, if only one, to a half; while, if all her children had predeceased her, he was entitled to her whole succession, thus altogether defeating her testamentary disposition.

§ 45. Comp. § 53; Vlp. xxix, 4; pr. I. *de adsign. lib.* (iii, 8).

patroni; *item de nepote ex filio*, pronepote *ex nepote filio nato*  
 46 *prognato*. Filia uero patroni, et *neptis ex filio et proneptis*  
*ex nepote filio nato prognata, olim quidem eo iure [utebantur]*  
*quod*<sup>1</sup> lege XII tabularum patrono datum est, — — — — —<sup>2</sup>  
*sexus* patronorum liberos — — — — —<sup>3</sup> testamenti liberti  
 [aut] ab intestato contra filium adoptiuum, uel uxorem nurum-  
 ue quae in manu fuerit, bonorum possessionem petat, trium  
 liberorum iure lege Papia consequitur; aliter hoc ius non  
 47 habet. Sed ut ex bonis libertae testatae quattuor liberos  
 habentis<sup>1</sup> uirilil pars ei debeatur, ne liberorum quidem iure  
 consequitur, ut quidam putant, sed *tantum*<sup>2</sup> intestata liberta  
 mortua uerba legis Papiae faciunt ut ei uirilil pars debeatur.  
 si uero testamento facto mortua sit liberta, tale ius ei datur  
 quale datum est contra tabulas testamenti liberti, id est quale

to his grandson by a son, and to his great-grandson by a  
 46 grandson who is the issue of a son. As for his daughter,  
 his granddaughter by a son, and his great-granddaughter by a  
 grandson the issue of a son, they had in old times the same  
 right as was conferred by the Twelve Tables on the patron  
 himself. [*The praetor, however, calls only*] the male descendants  
 of patrons. [*If a daughter demand possession of the estate of*  
*[a freedman contrary to the tenor of his]* testament, or claim it  
 on intestacy as against an adoptive son or a wife or daughter-  
 in-law who had been *in manu*, it is under the Papian law  
 that she does so, and in virtue of her privilege of three  
 47 children; otherwise she has no such right. Some think  
 that this privilege of maternity does not entitle a patron's  
 daughter to a proportionate share of the estate of a freed-  
 woman with four children who has executed a testament,—  
 that, according to the letter of the Papian law, it is only in the  
 event of the freedwoman dying intestate that a child's share  
 is due to her. But if the freedwoman have left a testament,  
 the patron's daughter has really the same rights as against  
 the will that she would have were it that of a freedman,—that  
 is to say, the same rights that male descendants of a patron

§ 46. Comp. Vlp. xxix, 5.

<sup>1</sup> *Olim . . . quod* is the reading of K. (K. u. S. footnote); the ms. is very indistinct.

<sup>2</sup> K. fills this blank with *praetor autem non nisi uirilil sexus*, etc.

<sup>3</sup> The same ed. fills the second blank with *liberos uocat; filia*

*uero ut contra tabulas testamenti*, etc.

§ 47. Comp. Vlp. xxix, 5.

<sup>1</sup> The fact that she was mother of four children freed a *liberta* from tutelage, and enabled her to make a will at her own hand; see § 44.

<sup>2</sup> So P.; the ms. and other eds. have *tamen*.

- et uirilis sexus patronorum liberis contra tabulas testamenti liberti habent :<sup>3</sup> quamuis parum diligenter ea pars legis scripta sit. Ex his apparet extraneos heredes patronorum longe remotos esse ab omni eo iure quod uel in intestatorum bonis uel contra tabulas testamenti patrono competit.
- 48 Patronae olim ante legem Papiam hoc solum ius habebant in bonis libertorum quod etiam patronis ex lege XII tabularum datum est. nec enim ut contra tabulas testamenti ingrati liberti, uel ab intestato contra filium adoptiuum uel uxorem nurumue bonorum possessionem partis dimidiaae peterent, praetor similiter ut de patrono liberisque eius curabat. Sed lex Papia duobus liberis honoratae ingenuae patronae, libertinae tribus, eadem fere iura dedit quae ex edicto praetoris patroni habent ;<sup>1</sup> trium uero liberorum iure honoratae ingenuae patro-

have as against the testamentary writings of a freedman ; [such is the true meaning of the enactment], although in this part of it it is not very carefully worded. From what has been said it is clear that stranger-heirs of a patron have no participation in the rights competent to him either in regard to the estates of his intestate freedmen, or, by procedure *contra tabulas*, in regard to those who have died testate.

- 49 Formerly, and before the Papian law, patronesses had no greater right in the estates of their freedmen than had been accorded to patrons by the law of the Twelve Tables ; the praetor did not concede to them, as he did to a patron and his children, the right to claim either possession of the estate of an ungrateful freedman contrary to the tenor of his testament, or possession of half the estate of a freedman dying intestate as against his adoptive son or his wife or daughter-in-law.
- 50 The Papian law, however, gave a patroness of free birth who had the honour of being the mother of two children, and to a freedwoman-patroness who was the mother of three, almost the same rights as are enjoyed by patrons under the edict. Further, it gave to a free-born patroness with three children

<sup>3</sup> On the death intestate of a freedwoman her patron's daughter, if she enjoyed the *ius trium liberorum*, took an equal share with the children by whom the freedwoman was survived ; if the latter died testate, leaving her succession to her children, the patron's daughter had no claim ; but if the testatrix left her estate to strangers, there was a claim *contra tabulas* for *bonor. possessio dimidiaae partis*, so that a patron's daughter

was thus in much the same position as a *patrona* (§ 52). At least this seems to be the meaning of the par.

§ 48. Comp. §§ 58, 64.

§ 49. Comp. §§ 40, 41 ; Vlp. xxvii, 1 ; xxix, 6.

§ 50. Comp. §§ 41, 42 ; Vlp. xxix, §§ 6, 7.

<sup>1</sup> I.e. the right to *bonor. possessio dimidiaae partis* where the succession was testamentarily left to others than the freedman's *sui* by birth.



- nae ea iura dedit quae per eandem legem patrōno data sunt;<sup>2</sup>
- 51 libertinae autem patronae non idem iuris praestitit. Quod autem ad libertinarum bona pertinet, si quidem intestatae decesserint, nihil noui patronae liberis honoratae lex Papia praestat: itaque si neque ipsa patrona neque liberta *capite deminuta* sit, ex lege XII tabularum ad eam hereditas pertinet et excluduntur libertae liberi; quod iuris est etiam si liberis honorata non sit patrona: numquam enim, sicut supra diximus,<sup>1</sup> feminae suum heredem habere possunt: si uero uel huius uel illius capitis deminutio interueniat, rursus liberi libertae excludunt patronam, quia, legitimo iure capitis deminutione perempto, euenit ut liberi libertae cognationis
- 52 iure potiores habeantur. Cum autem testamento facto moritur liberta, ea quidem patrona quae liberis honorata non est nihil iuris habet contra libertae testamentum; ei uero quae liberis honorata sit hoc ius tribuitur per

- the same rights it had itself conferred upon a patron; but
- 51 these were not extended to a freedwoman-patroness. As regards the estates of freedwomen who had died intestate, the Papian law conceded nothing new to a patroness privileged by reason of her children; so that if neither the patroness herself nor her freedwoman be *capite deminuta*, the inheritance belongs to the former according to the law of the Twelve Tables, and the freedwoman's children are excluded. The rule is the same even if the patroness be not privileged as the mother of children; for, as already observed, a woman can never have a *suus heres*. If, however, there have been *capitis deminutio* either of the patroness or of her freedwoman, the latter's children then exclude the patroness; for, on the extinction of her statutory right by *capitis deminutio*, the children of her freedwoman are preferred in right of kinship.
- 52 When the deceased freedwoman has left a testament, a patroness who has no privilege by reason of children has no right in opposition to it; on her, however, who is the mother of children, the Papian law confers the same right that a

<sup>2</sup> *I.e.* right to a *uirilis portio* of the estate of a *centenarius* leaving not more than two children.

§ 51. Comp. i, 158; Vlp. xxvii, 5.

<sup>1</sup> Comp. ii, 161; iii, 43.

§ 52. Comp. §§ 41, 47; Vlp. xxix, 7.  
A *liberta* who had not a patron but

a patroness could make a will, even though she had not the *ius liberorum*, and was still in tutelage; for she was under the tutory not of her patroness but of an Atilian tutor, who could not withhold his *auctoritas* (ii, 122).

legem Papiam quod habet ex edicto patronus contra tabulas liberti.

53 Eadem lex patronae filio liberis honorato — — <sup>1</sup> *patroni*<sup>2</sup> iura dedit; sed in huius persona etiam unius filii filiaeue ius sufficit.

54 Hactenus omnia [*in bona civium Romanorum libertinorum*] iura quasi per indicem tetigisse satis est. alioquin diligentior

55 interpretatio propriis commentariis exposita est. Sequitur

56 ut de bonis latinorum libertinorum dispiciamus. Quae pars iuris ut manifestior fiat, admonendi sumus id quod alio loco diximus, eos qui nunc latini Iuniani dicuntur olim ex

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patron enjoys under the edict in opposition to the testament of his freedman.

53 The same enactment has conferred on the son of a patroness, himself honoured on account of children, almost the same right it gives to a patron(?); but in his case one son or daughter suffices.

54 It is enough to have thus touched in a sort of outline upon all those rights [*of patrons in the estates of those of their freedmen who are Roman citizens*]; a more minute exposition

55 of them is given elsewhere in a special treatise. We have now to deal with the estates of freedmen who are latins.

56 To render this branch of our subject more intelligible, let us bear in mind what was said in another place,—that those who are now called Junian latins were formerly by quiritarian

§ 53. Comp. Paul. fr. 18, Pap. fr. 42, pr. D. *de bon. libertor.* (xxxviii, 2).

<sup>1</sup> In the blank the ms. has *cre*. M. (K. u. S. footnote) suggests *civui Romano*; K. (*Krit. Vers.* p. 127), *ferē*; P., *omnia fere*; Hu., *prope*.

<sup>2</sup> The ms. and most eds. have *patroni*, Gou. and P., *patronae*. A patron had greater rights than a patroness; but it seems unreasonable to suppose that a son could have greater rights than the mother he represented.

§ 54. It is generally supposed that there is something omitted in the ms.; the words interpolated seem to express what is meant. The treatise to which Gai. refers was possibly his commentary on the *lex Julia et Papia*.

§ 55. Preceded in the ms. by a vacant line, probably for a rubric. The following sentences may serve as an introduction to the next six or seven

pars. :—‘The capacity of the Junian latin to execute a testament was denied by the law. The law, therefore, and not his will, could alone decide to whom his estate should fall. There was no room, however, to speak of any real *successio ab intestato*, for a latin had no agnates. Even his patron could not succeed *ab intestato*; for the patronal right of succession was based on a fictitious agnation; and such a fiction could not possibly be entertained where the capacity to be a party in an agnatic relationship was absolutely denied. Accordingly no one, not even his patron, would have had a right to the estate of a deceased latin, had not the Junian law made express provision for its disposal.’ (Vang. *Lat. Iun.* p. 129).

§ 56. Comp. i, §§ 22, 131; Vlp. i, 10; Fr. Dos. §§ 5, 6; § 4, tit. I. *ad.*; l. un. pr. C. *de lat. lib. toll.* (vii, 6).

iure Quiritium seruos fuisse, sed auxilio praetoris in libertatis forma seruari solitos; unde etiam res eorum peculii iure ad patronos pertinere solita est: postea uero per legem Iuniam<sup>1</sup> eos omnes quos praetor in libertate tuebatur liberos esse coepisse et appellatos esse latinos Iunianos; latinos ideo, quia lex eos liberos perinde esse uoluit atque si essent ciues Romani ingenui<sup>2</sup> qui ex urbe Roma in latinas colonias deducti latini coloniarii esse coeperunt; Iunianos ideo, quia per legem Iuniam liberi facti sunt, etiamsi non essent ciues Romani.<sup>2</sup> legis itaque Iuniae lator, cum intellexeret futurum ut ea fictione res latinorum defunctorum ad patronos pertinere desinerent, *quia (scilicet)*<sup>3</sup> *neque ut* serui decederent ut possent iure peculii res eorum ad patronos pertinere, neque liberti latini *Iuniani*<sup>4</sup> bona possent manumissionis iure ad patronos pertinere,<sup>5</sup> *existimauit*, ne beneficium istis datum in iniuriam patronorum conuerteretur, cauere<sup>6</sup> ut

law slaves, although, by help of the praetor, they used to have assured to them a semblance of freedom; consequently that their effects used to belong to their patrons as in law no more than *peculium*; but that afterwards, by the Junian law, all those whom the praetor protected in [the enjoyment of *de facto*] freedom, began really to be freemen, and to be called Junian latins,—latins, because it was the intention of the statute that they should be in the position of those freeborn Roman citizens who, having been despatched from the City to latin colonies, became colonial latins; Junian, because by the Junian law they became free, although they were not Roman citizens. And so the author of the Junian law, foreseeing that by this fiction the estates of deceased latins would cease to belong to their patrons,—for, as they were not to die slaves, their effects could not belong to their patrons in virtue of an owner's *ius peculii*, neither could the estate of a Junian freedman belong to his patron in right of manumission,—thought it necessary, in order to prevent the boon conferred

<sup>1</sup> The *lex Iunia Norbana*; see i, 22, note 2.

<sup>2</sup> The passages *atque . . . ingenui*, and *etiamsi . . . Romani*, according to M. (K. u. S. footnote), are glosses.

<sup>3</sup> Illegible in the ms.; suggested by Stud., and adopted by P. and all later eds.

<sup>4</sup> The ms. has *liberti latini hominis*, which is evidently a mistake, though accepted by most eds. If *liberti*

be deleted as a gloss, as suggested by K. u. S., *hominis* may stand; but I prefer to retain the former, and replace the latter with *Iuniani*.

<sup>5</sup> The patron's right was a *successio legitima*, sanctioned by the Twelve Tables (i, 165), which knew only citizen freedmen, and nothing of Junian latins.

<sup>6</sup> The ms. has *cauere uoluit*; Hu. reads the latter word *uoluitque*.

*bona eorum* proinde ad manumissores pertinerent ac si lex lata non esset: itaque iure quodammodo peculii bona latino-  
 57 rum ad manumissores ea lege pertinent. *Vnde accidit ut longe differant ea iura quae in bonis latinorum ex lege Iunia constituta sunt ab his quae in hereditate ciuium Romanorum*  
 58 *libertorum observantur.* Nam ciuis Romani liberti hereditas ad extraneos heredes patroni nullo modo pertinet; ad filium autem patroni nepotesque ex filio et pronepotes ex nepote [*filio nato*]<sup>1</sup> *prognatos* omnimodo pertinet, etiamsi a parente fuerint exheredati; latinorum autem bona tamquam peculia seruorum etiam ad extraneos heredes pertinent, et ad  
 59 liberos manumissoris exheredatos non pertinent. Item ciuis Romani *liberti* hereditas ad duos pluresue patronos aequaliter pertinet, licet dispar in eo seruo dominium habuerint; bona uero latinorum pro ea parte pertinent pro qua parte quisque  
 60 eorum dominus fuerit. Item in hereditate ciuis Romani liberti patronus alterius patroni filium excludit, et filius

upon the freedmen becoming an injury to their patrons, to provide that their estates should belong to their manumitters just as if the enactment had not been passed; accordingly, in virtue of the enactment, the estates of [deceased] latins belong to their enfranchisers in a manner *iure peculii*.  
 57 Hence it happens that the rights created in the estates of latins by the Junian law differ very much from those that are recognised in reference to the inheritance of a freedman who  
 58 is a Roman citizen. For, first, the inheritance of a citizen freedman in no case belongs to the stranger-heirs of his patron,—on the contrary it belongs in all cases to the patron's son, his grandsons by a son, or great-grandsons by a grandson who is the issue of a son, and that even though they may have been disinherited by their parent; whereas the estates of latins, just as if they were the *peculia* of slaves, pass even to stranger-heirs, and do not belong to the disinherited  
 59 children of the manumitter. Further, the inheritance of a citizen freedman belongs to two or more patrons equally, even though they may have owned him in unequal shares when a slave; whereas they succeed to the estates of their latin freedmen in shares corresponding to those they each had as  
 60 owners. Further, in the inheritance of a citizen freedman one patron excludes the son of another, and the son of one

§ 58. Comp. §§ 45-48.

§ 60. Comp. Vlp. xxvii, §§ 2, 3; Paul.

<sup>1</sup> These words introduced by L., and adopted by all eds.

iii, 2, § 1; § 3, tit. I. afd.



- patroni alterius patroni nepotem repellit: bona autem latino-  
rum et ad ipsum patronum et ad alterius patroni heredem  
simul pertinent, pro qua parte ad ipsum manumissorem per-  
61 tinerent. Item si unius patroni tres forte liberi sunt et  
alterius unus, hereditas ciuis Romani liberti in capita diuiditur,  
id est tres fratres tres portiones ferunt et unus quartam; bona  
uero latinorum pro ea parte ad successores pertinent pro qua  
62 parte ad ipsum manumissorem pertinerent. Item si alter  
ex his patronis suam partem in hereditate ciuis Romani  
liberti spernat, uel ante moriatur quam cernat, tota hereditas  
ad alterum pertinet; bona autem latini pro parte *deficientis*<sup>1</sup>  
patroni caduca<sup>2</sup> fiunt et ad populum pertinent.
- 63 Postea, Lupo et Largo consulibus, senatus censuit ut bona  
latinorum primum ad eum pertinerent qui eos liberasset;  
deinde ad liberos<sup>1</sup> eorum non nominatim exheredatos, uti

- patron excludes the grandson of another; but the estate of a  
latin belongs at the same time to his [surviving] patron and  
his [deceased] patron's heir, [and to the latter] to the extent to  
61 which it belonged to the [deceased] manumitter. Further,  
if there be three children say of one patron and one child of  
another, the inheritance of a citizen freedman is divided *in*  
*capita*, i.e. the three brothers take three shares, and the single  
child gets the fourth; the estate of a latin, however, belongs  
to successors in the same proportions in which it belonged  
62 to the manumitters themselves. Further, if one of two  
patrons decline his share of the inheritance of a citizen freed-  
man, or die before declaring his acceptance of it, the whole  
inheritance belongs to the other; but the estate of a latin, as  
regards the share of a patron failing to take, becomes caducous  
and falls to the state.
- 63 Afterwards, during the consulate of Lupus and Largus, the  
senate decreed that the estates of [deceased] latins should  
belong in the first place to those who had manumitted them;  
in the next place to the latter's descendants not nominately dis-  
inherited, according to proximity; [failing such descendants,]

§ 61. Comp. Vlp. xxvii, § 4; Paul. iii,  
2, § 3; § 3, tit. I. afd.

§ 62. Comp. Paul. iii, 2, § 2.

<sup>1</sup> So G. and most eds.; the ms.  
has *decedentis*.

<sup>2</sup> See Vlp. tit. xvii.

§ 63. Comp. § 4, tit. I. afd., where the  
SC. referred to is called *Scutum Lar-*

*gianum*. There was a Largus con-  
sul p. C. 42.

<sup>1</sup> *Liberi* is to be understood here  
in the sense in which the word is  
used by the praetor in his edict; as  
meaning, not descendants generally,  
but children whom a testator was  
required to disinherit, — *sui* and  
*quasi sui*; see § 71.

quisque proximus esset; tunc antiquo iure ad heredes eorum  
 64 qui liberassent pertinerent. Quo senatusconsulto quidam  
 [*id*]<sup>1</sup> actum esse putant, ut in bonis latinorum eodem iure  
 utamur quo utimur in hereditate ciuium Romanorum liberti-  
 norum; *idque*<sup>2</sup> maxime Pegaso<sup>3</sup> placuit. quae sententia aperte  
 falsa est: nam ciuis Romani liberti hereditas numquam ad  
 extraneos patroni heredes pertinet; bona autem latinorum  
 etiam<sup>4</sup> ex hoc ipso senatusconsulto non obstantibus liberis  
 manumissoris etiam ad extraneos heredes pertinent; item in  
 hereditate ciuis Romani liberti liberis manumissoris nulla  
 exhereditatio nocet, in bonis latinorum nocere nominatim  
 factam exheredationem ipso senatusconsulto significatur.  
 uerius est ergo hoc solum eo senatusconsulto actum esse, ut  
 manumissoris liberi qui nominatim exhereditati non sint prae-  
 65 ferantur extraneis heredibus. Itaque emancipatus filius  
 patroni praeteritus, quamuis contra tabulas testamenti parentis  
 sui bonorum possessionem non petierit, tamen extraneis here-

then to the heirs of the manumitters in accordance with the  
 64 old law. It is a result of this senatusconsult, as some  
 jurists maintain, that we must follow the same rule in refer-  
 ence to the estates of latins that we do in reference to the  
 inheritance of citizen freedmen,—a view that commended  
 itself notably to Pegasus. But their opinion is manifestly  
 erroneous. For the inheritance of a citizen freedman never  
 belongs to stranger-heirs of the patron; whereas, by the very  
 terms of the senatusconsult, the estates of latins do belong to  
 stranger-heirs of the manumitter, failing his children. Further,  
 in the inheritance of a citizen freedman, the children of the  
 manumitter are not prejudiced by any disherison; whereas it  
 is expressly declared in the senatusconsult that nominate  
 disherison does prejudice them as regards the estates of latins.  
 The more correct view therefore is that all that was done by  
 this senatusconsult was to declare that children of the manu-  
 mitter, not individually disinherited, should be preferred to  
 65 stranger-heirs. An emancipated son of a patron, conse-  
 quently, who has been passed over in his testament, although  
 he may not have petitioned for possession of the estate of his  
 parent contrary to the tenor of the will, is yet preferred to  
 stranger-heirs in the estates of latins [manumitted by his

§ 64. Comp. §§ 48, 58.

<sup>1</sup> G. and all eds.

<sup>2</sup> So G. and all eds.; the MS. has  
*idemque*.

<sup>3</sup> See ii, 254, note 1.

<sup>4</sup> K. u. S. think this word has  
 crept in *per incuriam*, and should  
 be deleted.

- 66 dibus in bonis latinorum potior habetur. Item filia ceterique sui heredes, licet iure ciuili inter ceteros exheredati sint, et ab omni hereditate patris sui summoueantur, tamen in bonis latinorum, nisi nominatim a parente fuerint exheredati, potior  
 67 ores erunt extraneis heredibus. Item ad liberos qui ab hereditate parentis se abstinerunt,<sup>1</sup> *nihilominus bona* latino-  
 rum pertinent; (*nam hi quoque* exheredati nullo modo dici possunt, non magis quam qui testamento silentio praeteriti sunt).  
 68 Ex his omnibus satis illud apparet, si is qui latinum *fecerit*,  
 69 — — — — —. Item *illud quoque* constare uidetur, si solos liberos ex disparibus partibus patronus — —  
 — — — — — tant ad eos pertinere, quia nullo interueniente  
 70 extraneo herede senatusconsulto locus non est. Sed si cum

- 66 parent]. A daughter, too, and other *sui heredes*, although they may have been disinherited in a *ceteri* clause according to the requirements of the *ius ciuile*, and thus excluded from any participation in their father's inheritance, are nevertheless preferred to his stranger-heirs in the estates of latins of his, unless they have been nominately disinherited by him.  
 67 Further, the estates of latins belong to children notwithstanding they may have held aloof from their parent's inheritance; for such children can no more be said to have been individually disinherited than can those who have been passed over by a testator in silence.  
 68 From all this it is sufficiently evident that he who has made his slave a latin — — — — —.  
 69 Further, *this also seems to be the general opinion*,—that if a patron have left his children his sole heirs, but instituted them to unequal shares, [*the sounder view is that of those who think that the estate of a deceased latin will belong to them in proportion to their shares of the inheritance*]; for, as there is now no question of the intervention of a stranger-heir,  
 70 the senatusconsult does not apply. But if, along with his

§ 67. A few letters in the ms. are altogether illegible, and others uncertain. The reading given above is that of K. u. S.; there have been others proposed, but all are substantially to the same effect.

<sup>1</sup> Comp. ii, 158.

§ 68. With exception of the first word (*fecerit*), the last line of p. 143 of the ms. is illegible; so, with the exception of a word here and there, are the first twenty-one lines of p. 144.

§ 69. Last line and a half of p. 144 ille-

gible. P. suggests—*patronus heredes reliquerit, rectius existimare qui latinum pro hereditariis partibus putant ad eos, etc.* K. u. S. propose—*patronus heredes instituerit, ex eisdem partibus bona latini, si patri heredes existant, ad eos, etc.* Hu. proposes—*patronus heredes reliquerit, quod pro hereditariis partibus, non pro uirilibus, bona latini putant ad eos, etc.*

§ 70. Caelius (spelt *Selius* in the ms.) Sabinus flourished in the reign of

liberis suis etiam extraneum heredem patronus reliquerit, Caelius Sabinus ait tota bona pro uirilibus partibus ad liberos defuncti pertinere, quia cum extraneus heres interuenit non habet lex Iunia locum, sed senatusconsultum; Iauolenus autem ait tantum eam partem ex senatusconsulto liberos patroni pro uirilibus partibus habituros esse quam extranei heredes ante senatusconsultum lege Iunia habituri essent, reliquas uero partes pro hereditariis partibus ad eos pertinere.

- 71 Item quaeritur an hoc senatusconsultum ad eos patroni liberos pertineat qui ex filia nepteue procreantur, id est ut nepos meus ex filia potior sit in bonis latini mei quam extraneus heres; item [*an*] ad maternos latinos hoc senatusconsultum pertineat quaeritur, id est ut in bonis latini materni potior sit patronae filius quam heres extraneus matris. Cassio placuit utroque casu locum esse senatusconsulto; sed huius sententiam plerique improbant, quia senatus de his liberis patrono-

children, the patron have also left a stranger-heir, Caelius Sabinus maintains that the whole estate [of the deceased latin] will belong to the patron's children in equal shares, since, owing to the intervention of a stranger-heir, it is not the Junian law but the senatusconsult that comes into play; Javolenus, however, holds that under the senatusconsult the patron's children will take in equal shares so much only of the [latin's] estate as, before the senatusconsult and under the Junian law, the stranger-heir would have been entitled to, and that the remainder will belong to them in proportion to

- 71 their shares in their father's inheritance. Then it is asked whether this senatusconsult applies to those descendants of a patron who are the issue of a daughter or granddaughter,—that is, whether my grandson by my daughter is to be preferred to a stranger-heir in the estate of a latin of mine? It is also asked whether the senatusconsult applies to a mother's latins,—that is, whether the son of a patroness has a better right to the estate of a latin of hers than her stranger-heirs? Cassius held that in both cases there was room for the senatusconsult. But this opinion of his is disapproved by most jurists, on the ground that the senatusconsult does not have in view those descendants of a patron who really are

Vespasian (fr. 2, § 47, D. *de orig. iur.* i, 2), and probably was a son of Masurius Sabinus referred to in i, 196, note 1. Iauolenus Priscus was his successor as chief of the Sabinian school.

§ 71. The Cassius here mentioned—C. Cassius Longinus—was leader of the Sabinian school immediately before Caelius Sabinus; from him they got their occasional name of Cassians.



rum<sup>1</sup> nihil sentiat qui aliam familiam sequerentur; idque ex eo adparet quod nominatim exheredatos summouet; nam uidetur de his sentire qui exheredari a parente solent si heredes non instituantur; neque autem matri filium filiamue, neque auo materno nepotem neptemue, si eum eamue heredem non instituat, exheredare necesse est, siue de iure ciuili quæramus, siue de edicto prætoris quo præteritis liberis contra tabulas testamenti bonorum possessio promittitur.

- 72 Aliquando tamen ciuis Romanus libertus tamquam latinus moritur, uelut si latinus saluo iure patroni ab imperatore ius Quiritium consecutus fuerit; *item*<sup>1</sup> si latinus inuito uel ignorante patrono ius Quiritium ab imperatore consecutus sit; *quibus casibus* ut diuus Traianus constituit,<sup>1</sup> dum uiuit iste libertus, ceteris ciuibus Romanis libertis similis est et iustos liberos procreat, moritur autem latini iure, nec ei liberi eius heredes esse possunt; et in hoc tantum habet testamenti

members of a different family. And this is evident from the fact that it excludes children individually disinherited, and thus seems to have in view only such children as it is the custom for a parent to disinherit if he is not instituting them heirs. But it is not necessary for a mother to disinherit her son or daughter if she is not instituting him or her as her heir, nor for a maternal grandfather to disinherit his grandson or granddaughter: it is unnecessary whether we look to the *ius ciuile* or to the edict of the prætor promising possession of an estate contrary to the tenor of a testament to children passed over in it.

- 72 Sometimes a freedman that is a Roman citizen dies as if he were a latin, as, for instance, when a latin has obtained from the emperor a grant of citizenship under reservation of patronal rights; as also when a latin has obtained the *ius Quiritium* from the emperor against his patron's will or without his knowledge. In those cases, as was enacted by the late emperor Trajan, so long as such a freedman lives he is in like position with all other citizen freedmen, and the children he begets are lawful children; yet he dies as a latin, and his children cannot be his heirs; his testamentary capacity is

<sup>1</sup> The ms. has *patronarum*; in either form the word is probably a gloss, in the latter an inaccurate one.

§ 72. Comp. § 4, tit. I. afd.

<sup>1</sup> After *fuerit* the ms. has *nam ut*

*diuus Traianus constituit*, a text that makes *quibus casibus* unmeaning. Hu., altering the *nam* into *item*, transposes the other four words, and by placing them after *quibus casibus* restores these their value.

- factionem, ut patronum heredem instituat eique si heres esse  
 73 noluerit alium substituere possit. Et quia hac constitu-  
 tione uidebatur effectum ut ne umquam isti homines tamquam  
 ciues Romani morerentur, quamuis eo iure postea *usi* essent  
 quo uel ex lege *Aelia Sentia* uel ex senatusconsulto ciues  
 Romani essent, diuus Hadrianus, iniquitate rei motus, auctor  
 fuit senatusconsulti faciendi, ut qui ignorante uel recusante  
 patrono ab imperatore ius *Quiritium* consecuti essent, si eo  
 iure postea *usi* essent quo ex lege *Aelia Sentia* uel ex senatus-  
 consulto, si latini *mansissent*,<sup>1</sup> ciuitatem Romanam conseque-  
 rentur, proinde ipsi haberentur ac si lege *Aelia Sentia* uel  
 senatusconsulto ad ciuitatem Romanam peruenissent.
- 74 Eorum autem quos lex *Aelia Sentia* dediticiorum numero  
 facit, bona modo quasi *ciuium* libertorum, modo quasi latino-  
 75 rum ad patronos pertinent. Nam eorum bona qui, si in  
 aliquo uitio non essent, manumissi ciues Romani futuri essent,  
 quasi *ciuium* Romanorum patronis eadem lege tribuuntur.

- limited to this,—that he may institute his patron as his heir,  
 and substitute some third party in his place in the event of  
 73 his declining the inheritance. As it seemed to be the effect  
 of this constitution [of Trajan's] that such freedmen could  
 never die as Roman citizens, even although they afterwards  
 took advantage of the procedure for becoming citizens either  
 under the *Aelia-Sentian* law or under the senatusconsult, the  
 late emperor Hadrian, moved thereto by the unfairness of the  
 case, induced the senate to decree that if those who had  
 obtained the *ius Quiritium* from the emperor, without the  
 knowledge or notwithstanding the objections of their patrons,  
 afterwards made use of the procedure whereby, had they  
 remained latins, they would have acquired Roman citizenship  
 either under the *Aelia-Sentian* law or under the senatus-  
 consult, they were to be regarded as if they had in fact  
 attained citizenship under one or other of these enactments.
- 74 The estates of those whom the *Aelia-Sentian* law ranks  
 as dediticianus belong to their patrons, sometimes after the  
 manner of the estates of citizen freedmen, sometimes after the  
 75 manner of those of latins. The estates of those who, had  
 there been no blemish on their characters, would, on manu-  
 mission, have been citizens, are by that statute given to their  
 patrons, just as if they were the estates of citizens. For

§ 73. Comp. i, §§ 29, 66-71.

<sup>1</sup> So G. and all eds.; the MS. has  
*manumissi essent*.

§ 74. Comp. i, 13.

§ 75. Comp. i, §§ 25, 26; Vlp. xx, §§  
14, 15.

non tamen *hi* habent etiam testamenti factionem : nam id plerisque placuit, nec inmerito : nam incredibile uidebatur pessimae condicionis hominibus uoluisse legis latorem testamenti faciendi ius concedere. Eorum uero bona qui, si non in aliquo uitio essent, manumissi futuri latini essent, proinde tribuuntur patronis ac si latini decessissent : nec me praeterit non satis in ea re legis latorem uoluntatem suam uerbis expressisse.

77 Videamus autem et de ea successione quae nobis ex  
78 emptione bonorum competit. Bona autem ueneunt aut uiuorum aut mortuorum : uiuorum, ueluti eorum qui fraudationis causa latitant nec absentes defenduntur ;<sup>1</sup> item eorum qui ex lege Iulia bonis cedunt ;<sup>2</sup> item iudicatorum post

deditionians have no testamentary capacity,—so most have held, and not without reason ; for it seemed incredible that the legislature could have meant to concede the right of making a testament to men of the basest condition. The estates of those again who, had they been of unblemished character, would, when manumitted, have been latins, are given to their patrons just as if they had died latins. It does not escape me, however, that on this point the author of the enactment has not expressed his meaning quite satisfactorily.

77 Let us consider now the succession that devolves on us by  
78 *emptio bonorum*. It is the estates of insolvent debtors, whether living or dead, that are thus brought to sale. There is sale of the estates of living debtors in the case of those who fraudulently keep out of the way of their creditors and are not defended in their absence ; of those who have ceded their effects under the Julian law ; and of judgment-debtors after

§§ 77-81. Comp. tit. I. *DE SVCCES-  
SIONIBVS SVBLATIS* (iii, 12).

§ 77. Comp. pr. tit. I. *afid. Emptio bonorum* was purchase of the estate of an insolvent, the purchaser becoming his universal successor. Gai. (iv, 35) attributes its introduction to Publ. Rutilius, generally understood to be P. Rutilius Rufus, the celebrated orator, jurist, and statesman, who became consul in 649 | 105.

§ 78. <sup>1</sup> Comp. Cic. *pro Quint.* xix, 60, xxiii, 74 ; Vlp. in fr. 7, D. *quib. ex*

*caus. in poss. eatur* (xlii, 4) ; Th. iii, 12, pr.

<sup>2</sup> Comp. tit. D. *de cess. bonor.* (xlii, 3) ; tit. C. *qui bonis cedere possunt* (vii, 71). It is doubtful whether the *lex Iulia* here referred to was the work of Julius Caesar or of Augustus ; more probably it was the latter, as the *lex Coloniae Iuliae Genetivae* (i, 22, note 1), due to the former, preserves unmodified the rigorous system of personal execution previously in use.

tempus quod eis partim lege XII tabularum partim edicto praetoris ad expediendam pecuniam tribuitur.<sup>3</sup> mortuorum bona ueneunt ueluti eorum quibus certum est neque heredes neque bonorum possessores neque ullum alium iustum successorem existere.<sup>4</sup> Si quidem uiui bona ueneant, iubet ea praetor per dies continuos XXX *possideri et*<sup>1</sup> proscribi, si uero mortui, *per* dies XV; postea iubet conuenire creditores et ex *eorum* numero<sup>2</sup> magistrum creari, id est eum per quem bona ueneant: *idque*, si uiui bona ueneant, in diebus X *fieri* iubet,<sup>3</sup> si mortui, in dimidio.<sup>4</sup> *diebus itaque uiui* bona XXXX,<sup>5</sup> mortui uero XX,<sup>6</sup> emptori addici iubet.<sup>7</sup> quare autem tardius uiuen-

expiry of the period which, partly under the law of the Twelve Tables and partly under the praetor's edict, is allowed them for procuring the money. There is sale of the estates of deceased debtors in the case, for example, of persons to whom it is certain that there will be neither heir, nor *bonorum* 79 *possessor*, nor any other lawful successor. If it be the estate of a living debtor that is being sold, the praetor orders it to be taken and held possession of, and publicly advertised, for thirty continuous days; or if it be the estate of a deceased debtor, for fifteen days. He then orders the creditors to meet, and one of their number to be appointed *magister*, the party, that is to say, by whom the estate is to be sold; and the sale itself he orders to be carried through in *ten* days if the estate be that of a living debtor, and in half that time if it be that of one who is dead. He thus orders that the estate of a living debtor shall be adjudged to the purchaser in *forty* days,

<sup>3</sup> The allusion is to the praetorian amendment of the old procedure-in-execution of the XII Tables, upon which we get a little light from the *lex Rubria*, chaps. 21, 22 (Bruns, pp. 86-91).

<sup>4</sup> Comp. ii, §§ 154, 158.

§ 79. Comp. Cic. *pro Quint.* viii, 30; Th. iii, 12, pr.

<sup>1</sup> The MS. has *possederit*; a reading which P. retains, and justifies by introducing certain words, making the passage run—*iubet ea praetor, [postquam ea aliquis ex edicto] per dies continuos XXX possederit, proscribi*.

<sup>2</sup> The MS. has *ex eo numero*.

<sup>3</sup> This is Mommsen's reading (in K. u. S. footnote). The MS. has—*itaque, si uiui bona ueneant, in die-*

*bus V fieri iubet*. K. (*Krit. Versuche*, p. 137), reading the v as a contraction of *uenditionem*, proposes—*itaque, si uiui bona ueneant, in diebus [X bonorum] uenditionem fieri iubet*. Hu. has—*itaque . . . in diebus [X legem bonorum] uendendorum fieri iubet*.

<sup>4</sup> So the MS.; Hu., dropping the *dimidio*, utilizing the next word, and interjecting v, makes it *in diebus V*.

<sup>5</sup> The MS. has XXX,—an obvious error.

<sup>6</sup> Hu. has—[*die*] *tandem uiui bona XX, mortui uero X*, etc.

<sup>7</sup> The *addictio* was the act of the *magister*. The same word was used to express the knocking-down of a lot by an auctioneer to the highest bidder at a sale (Cic. *pro Caec.* vi, 16).



tium bonorum uenditio conpleri iubetur illa ratio est, quia de uiuis curandum erat ne facile bonorum uenditiones paterentur.<sup>8</sup>

- 80 Neque autem bonorum *possessorum* neque *bonorum emptorum res* pleno iure *fiunt*, sed in bonis efficiuntur; *ex iure Quiritium* autem ita demum adquiruntur si usuceperunt. interdum quidem bonorum emptoribus *ne usus* quidem *capio* contingit, *ueluti si per eos* — — — — —.<sup>1</sup>
- 81 *Item quae debita* — — — aut ipse debuit, neque bonorum possessor *neque* bonorum emptor ipso iure debet — — — —

and that of a deceased debtor in twenty. The reason why the sale of the estates of living debtors is ordered to be completed more slowly is, that care ought to be taken, where living persons are concerned, that they have not to submit to sale of their estates unnecessarily.

- 80 Neither in *bonorum possessio* nor in *bonorum uenditio* do the things thereby acquired belong to the possessors or purchasers in full ownership,—they are theirs only *in bonis*; but they acquire them eventually in quiritarian right by usucapion. In the case of *bonorum emptores*, however, usucapion is sometimes impossible, as for instance, when — — — — —.
- 81 [*What was due to him to whom the estate formerly belonged*], or due by him, is neither due *ipso iure* to the *bonorum possessor* or *bonorum emptor*, [*nor due by him*; consequently it is neces-

<sup>8</sup> The proper reading of this par. (from *idque* down to *addici iubet*) is much controverted. Th., in his account of *bonor. emptio*, specifies three acts of the *magistrate* in reference to the insolvent's estate, viz. (1) grant of *bonorum possessio*, (2) order upon the creditors to elect a trustee and advertise the bankruptcy, and (3) approval of the price and the conditions of sale; between each of those acts, he says, there was an interval of days, which he leaves undefined; and then, after a third interval, came (4) the *ad-dictio*. As against this we have in the *notae* of Valer. Probus—B. E. E. P. P. V. Q. I. (*bona ex edicto possideri proscribi uenireque iubebo*), and the *bona possideri proscribei uenire* of the *L. Rubria de Gallia Cisalpina*, c. 22 (Bruns, p. 91), which both point to three orders by the prae-

tor (though not the same as are mentioned by Th.), viz. to take possession, to advertise, and to sell; and these orders imply only two intervals, which may correspond to those of Gaius, viz. 30 + 10 = 40, and 15 + 5 = 20. See also Cic. *ad Att.* vi, 1.

§ 80. Comp. Paul. in fr. 2, § 19, D. *pro emptore* (xli, 4); Th. iii, 12, pr.

<sup>1</sup> Two lines illegible, with exception of the words *bonorum emptor*. See Vlp. in fr. 7, § 3, D. *quib. ex caus. in poss. eatur* (xlii, 4).

§ 81. Comp. iv, §§ 33, 145; iii, 12, pr. These indicate the drift of the passage, viz. that in regard to what was due to or by a *bonor. possessor* or a *bonor. emptor*, neither held the position of creditor or debtor in strict law, yet nevertheless might sue or be sued by means of *utiles actiones*; (see ii, 78, note 1).

de omnibus rebus — — — — *in sequenti commentario* proponemus.

- 82 Sunt autem etiam alterius generis successiones quae neque lege XII tabularum neque praetoris edicto, sed eo iure [*quod*]  
 83 consensu receptum est introductae sunt. *Ecce enim*<sup>1</sup> cum paterfamilias se in adoptionem dedit, mulierue in manum conuenit,<sup>2</sup> omnes eius res incorporales et corporales, quaeque ei debitae sunt, patri adoptiuo coemptionatoriae acquiruntur, exceptis his quae per capitis deminutionem pereunt, quales sunt *ususfructus*,<sup>3</sup> operarum obligatio (*libertinorum*) quae per iusiurandum contracta est,<sup>4</sup> et (*lites quae aguntur*)<sup>5</sup> legitimo  
 84 iudicio.<sup>6</sup> Ex diuerso quod is debuit (*qui se in*) adoptionem dedit *quacumque in manum conuenit, (non) transit ad coemptionatorem aut ad patrem adoptiuum, nisi si hereditarium aes alienum (fuerit. tunc) enim, quia ipse pater adoptiuus aut coemptionator heres fit, directo tenetur iure; (is uero) qui se*

[*sary that he sue or be sued by means of utiles actiones, which*] we shall give an account of in our next Commentary.

- 82 There are besides successions of another sort, which owe their introduction neither to the Twelve Tables nor to the praetor's edict, but to those rules that have been received by  
 83 general consent. Thus when a *paterfamilias* has given himself in adoption, or a woman has passed *in manum*, all their belongings, corporeal and incorporeal, and everything that is due to them, become acquisitions of the adoptive father or the *coemptionator*, except those that come to an end by *capitis deminutio*, such as a right of usufruct, undertakings of service on the part of freedmen contracted by oath, and suits proceeding in a *iudicium legitimum*. Contrariwise, [liability for] what was due by him who has given himself in adoption, or her who has passed *in manum*, does not pass to the *coemptionator* or adoptive father, unless the debt be a hereditary one; in that case, as the adoptive father or the *coemptionator* himself becomes heir, he becomes directly liable, he

§§ 82-84. Comp. tit. I. *DE ADQVISTITIONE PER ADROGATIONEM* (iii, 10).

§ 82. Pr. tit. I. afl.

§ 83. Comp. §§ 1, 2, tit. I. afl.

<sup>1</sup> So the Inst.; the ms. has *etenim*.

<sup>2</sup> Comp. Cic. *Top.* iv, 23.

<sup>3</sup> P., following the Inst., reads—*quales sunt [ius agnationis, usus,] ususfructus.*

<sup>4</sup> Comp. Vlp. in fr. 7, D. *de oper. lib.* (xxxviii, 1).

<sup>5</sup> Studemund's suggestion, as accordant with the traces visible in the ms. K. u. S. and Hu., following Rudorff and Gou., and on the authority of fr. 58, D. *de O. et A.* (xliv. 7), read *lites contestatae*.

<sup>6</sup> Comp. iv, 104.

§ 84. Comp. iv, §§ 38, 80; Vlp. in fr. 2, pr. § 1, D. *de cap. min.*; § 3, tit. I. afl.

adoptandum dedit, quaeue in manum conuenit, desinit esse heres. De eo uero quod *proprio nomine* eae personae debuerint, licet neque pater adoptiuus teneatur neque coemptio-nator, (*et ne*) ipse quidem qui se in adoptionem *dedit* (*uel*) quae in manum conuenit maneat obligatus obligataue, *quia scilicet*<sup>1</sup> per capitis deminutionem *liberetur*, tamen in eum eamue utilis actio datur,<sup>2</sup> *rescissa* capitis deminutione, et si aduersus hanc actionem non defendantur, quae bona eorum futura fuissent si se alieno iuri non subiecissent uniuersa uendere creditoribus praetor permittit.

- 85 [Si quis] legitimam hereditatem (ei delatam, antequam cer)-  
nat aut pro herede gerat, alii in iure cedat, pleno iure fit ille

who has given himself in adoption, or she who has passed *in manum*, ceasing to be heir. As regards, however, debts due by such persons on their own account, although neither the adopted father nor *coemptionator* is liable, and neither the man who has given himself in adoption nor the woman who has passed *in manum* continues bound by the obligation, seeing they have been relieved from it by their *capitis deminutio*, an *utilis actio* is nevertheless given against him or her, the *capitis deminutio* being held rescinded; and if no defence be entered for them against this action, the praetor will allow their creditors to sell the whole goods and effects which would have been theirs had they not subjected themselves to another person's right.

- 85 If an individual, before he has formally declared his accept-  
ance of an inheritance that has devolved upon him by law, or

<sup>1</sup> The ms. has *si* after this word.

<sup>2</sup> See ii, 78, note.

§§ 85-87. Comp. ii, §§ 34-37, of which these are substantially a repetition. P. considers them spurious, and an interpolation by some scholar of Gaius'; and consequently relegates them to an appendix. But his argument against their authenticity—that neither *cernere* nor *pro herede gerere* can be used with propriety in regard to a *legitima hereditas*—is very inconclusive; for in ii, § 167, we find Gaius saying—*is qui . . . ab intestato legitimo iure ad hereditatem uocatur, potest aut cer-*

*nendo aut pro herede gerendo . . . heres fieri.*

§§ 85, 86. Comp. §§ 35, 36; Vlp. xix, §§ 12-15. Stud. observes that lines 5, 6, and 8 of p. 150 of the ms. seem to have been written in vermillion. The fifth is entirely illegible; of the sixth only the words *legitimam h.* are decipherable; of the eighth only the first half is legible. The meaning, however, is so obvious that no difficulty is experienced in supplying deficiencies. The readings of K. u. S. and Hu. are substantially the same as that given above.

- heres cui cessa est hereditas, (*proinde ac si ipse per*) legem ad hereditatem uocaretur; quodsi posteaquam heres extiterit cesserit, adhuc heres manet, et ob id creditoribus ipse tenebitur; sed res corporales transferet proinde ac si singulas in iure cessisset, debita uero pereunt, eoque modo debitores
- 86 hereditarii lucrum faciunt. Idem iuris est si testamento scriptus heres, posteaquam heres extiterit, in iure cesserit hereditatem; ante aditam uero hereditatem cedendo nihil agit.
- 87 Suus autem et necessarius heres an aliquid agant in iure cedendo quaeritur: nostri praeceptores nihil eos agere existimant; diuersae scholae auctores idem eos agere putant quod ceteri post aditam hereditatem; nihil enim interest utrum aliquis cernendo aut pro herede gerendo heres fiat, an iuris necessitate hereditati adstringatur.
- 88 (*Nunc transeamus*) ad obligationes, quarum summa diuisio

- before he has behaved as heir, transfer it to a third party by *in iure cessio*, he to whom the inheritance is thus ceded becomes heir, with all the rights of heir, *just as if he himself* had been called to the inheritance as heir-at-law. If, however, it is not until after he has assumed the character of heir that he has ceded the inheritance, he still remains heir, and it is he consequently that will be liable to the deceased's creditors; the corporeals he must hand over, as if they had been ceded individually; but claims are extinguished, and the debtors of
- 86 the deceased thus become gainers. The law is the same if a testamentary heir transfer the inheritance by *in iure cessio* after he has taken the position of heir; by ceding before he
- 87 has entered, however, he really does nothing. Whether the *suus* or the necessary heir does anything effectual by ceding an inheritance in court is a matter of controversy. Our authorities think that they do not. Those of the other school think that their act has the same effect as that of other heirs ceding the inheritance after entry; it being of no moment whether a man become heir by formal acceptance or by behaviour as heir, or be astricted to the inheritance by necessity of law.

- 88 *Now let us pass* to obligations. Their primary division is

§ 87. Comp. ii, 37.

§§ 88, 89. Comp. tit. I. DE OBLIGATIONIBVS (iii, 13).

§ 88. The first two words, unwritten in the MS., are supplied from pr. tit. I. *af.*



in duas species diducitur: omnis enim obligatio uel ex contractu nascitur uel ex delicto.

89 Et prius uideamus de his quae ex contractu nascuntur. harum autem quattuor genera sunt: aut enim re<sup>1</sup> contrahitur obligatio aut uerbis aut litteris aut consensu.

90 Re contrahitur obligatio uelut mutui datione; [*mutui autem*

into two classes; for every obligation originates either in contract or in delict.

89 First let us consider those that arise from contract. Of these there are four genera; for an obligation is contracted either by thing done, by [spoken] words, by writing, or by consent.

90 An obligation is contracted by thing done by giving a

§ 89. Comp. § 2, tit. I. *afid.* The verbal and literal contracts are often spoken of by the civilians as formal contracts, in contradistinction to the real and consensual ones, which they call material. In the verbal and literal contracts the obligation was created by words of style, written or spoken, no matter whether or not any substantial *causa obligandi* underlay them. The absence of such substantial *causa* might possibly afford an equitable defence to any action upon the contract; but *ipso iure* it was valid and effectual simply on the strength of the formal words made use of by the parties.

Earlier than any of those four classes were the *nexum* and the *iusiurandum*,—one a civil, the other a religious contract (or form of contracting), and both formal. The *nexum* is referred to by Gai. only in connection with the discharge of an obligation thereby created (iii, 173); the *iusiurandum* he refers to in § 84, in connection with the special case in which it was still employed; but practically both were long out of date. The *nexum* has been the subject of many disquisitions, and opinions about it are conflicting; the more notable theories are summarised, and the references to it in the ancient writers collected, by Danz, *R. R.* ii, pp. 18 f. Danz himself (*Sacrale Schutz*), and Voigt in his *Ius Naturale*, etc., are the leading writers on the *iusiurandum*; see a *resumé* of Danz's views, and

references to his authorities, ancient and modern, in his *R. R.* ii, pp. 32 f. See further, note to § 92, last paragraph.

<sup>1</sup> To translate *res* as 'the thing' (Sandars) or 'the thing itself' (Abdy and Walker) is too narrow, while 'performance' (Poste) is ambiguous. It is really equivalent to *factum*, and appropriately rendered by 'act' (Hunter, p. 281). It is in this sense Gai. says that obligations *ex delicto* are all of one and the same genus (§ 182); they all arise *re*,—by thing done; see Gai. in fr. 4 D. *de O. et A.* (xlv, 7). It is in the same sense that the so-called innominate contracts are spoken of as real, whether falling under the category *do ut des*, *do ut facias*, *facio ut des*, or *facio ut facias*; see fr. 5, § 1, D. *de praescr. verb.* (xix, 5). There were other obligations that were said to be created *re*,—by facts and circumstances, such as those arising from vicinage, from joint ownership, from jettison at sea, from *negotiorum gestio*, etc., some of which are dealt with in tit. I. *de obl. q. ex contr.* (iii, 27).

§§ 90, 91. Comp. tit. I. *QVIBVS MODIS RE CONTRAHITVR OBLIGATIO* (iii, 14). Just. enumerates four real contracts—*mutuum*, *commodatum*, *depositum*, *pignus*; Gai. mentions only the first. *Commodate*, *deposit*, and *pledge* were, long before his time, all well known as transactions of daily life, and are frequently referred to in his pages. But their contractual

[*datio*] proprie in his [*fere*] rebus contingit quae pondere numero mensura constant, qualis est pecunia numerata uinum oleum frumentum aes argentum aurum; quas res aut numerando aut metiendo aut pendendo in hoc damus, ut accipientium fiant et quandoque nobis non eadem sed aliae eiusdem naturae reddantur: unde etiam mutuum appellatum est, quia quod ita  
 91 tibi a me datum est ex meo tuum fit. Is quoque qui non debitum accepit ab eo qui per errorem soluit re obligatur; nam proinde ei condici potest SI PARET EVM DARE OPORTERE,<sup>1</sup> ac si mutuum accepisset. unde quidam putant pupillum aut mulierem, cui sine tutoris auctoritate non debitum per errorem datum est, non teneri condictione non magis quam mutui datione.<sup>2</sup> sed haec species obligationis non uidetur ex con-

loan for consumption. This occurs for the most part only in the case of things that are weighed, counted, or measured, such as money, wine, oil, corn, bronze, silver, gold. In transferring such things by number, measure, or weight, we do so with the intent that they shall become the property of the receiver, and that not the identical articles, but others of the same sort, shall some time or other be returned to us. Hence the word *mutuum*; for what is thus given by me to you,  
 91 from mine becomes thine. He also is laid under obligation by thing done who has taken payment of what is not really due to him from a party paying it in mistake; for on this ground a condiction will lie against him, with an intention 'if it appear that he ought to give,' in the same way as if he had received the money in loan. Accordingly some are of opinion that a pupil or a woman, to either of whom, without tutorial *auctoritas*, something has been paid in error that was not really due, is no more liable in a *condictio indebiti* than [on an action] for money lent. But this sort of obligation is not to be regarded as arising from contract; for he who gives a thing by way of payment means rather to distract than

characteristics were not yet well settled; commodate and pledge were still often dealt with as varieties of *credittum* (Vlp. in fr. 1, fr. 4, § 1, D. de reb. cred. xii, 1), giving rise to a *certi condictio* in the same way as *mutuum*; while deposit had not yet been altogether freed from the impress of the rule of the XII Tables (Paul. in *Collat.* x, 7, § 11), which regarded failure of duty on the part

of a depositary as a delict rather than a breach of contract.

§ 90. Gai. in fr. 1, 2, D. de O. et A. (xlv, 7), from which the interpolated words in ital. are supplied; pr. tit. I. afid. *Fere* seems to be a gloss.

§ 91. § 1, tit. I. afid. Comp. § 6, I. de obl. q. quasi ex contr. (iii, 27).

<sup>1</sup> Comp. iv, §§ 5, 41.

<sup>2</sup> Comp. ii, §§ 80-84.

tractu consistere, quia is qui soluendi animo dat magis distrahere uult negotium quam contrahere.

- 92 Verbis obligatio fit ex interrogatione et responsione, ueluti DARI SPONDES? SPONDEO, DABIS? DABO, PROMITTIS? PROMITTO, FIDEPROMITTIS? FIDEPROMITTO, FIDEIUBES? FIDEIUBEO,

to contract, [*i.e.* rather to dissolve a contract than to enter into one.]

- 92 A verbal obligation is created by question and answer thus: 'Do you religiously engage that such or such a thing shall be given?' 'I religiously engage [*spondeo*];' 'Will you give?' 'I will give;' 'Do you promise?' 'I promise;' 'Do you promise on your plighted faith?' 'I promise on my plighted faith [*fidepromitto*];' 'Do you authorize on your plighted faith?' 'I authorize on my plighted faith [*fideiubeo*];' 'Will you do?'

§§ 92-96. Comp. tit. I. DE VERBORVM OBLIGATIONE (iii, 15).

§ 92. Comp. pr. § 1, tit. I. *afid.*; Paul. ii, 3.

It is difficult in translation to convey an idea of the differences between those formulae. *Spondeo*? *spondeo*, was the oldest of them all, and even in the time of Gai. still affected by peculiarities (see §§ 93, 120) that testified to its antiquity and its origin in the *iusiurandum*. It might be employed either between the creditor and the principal debtor, or between the creditor and a surety (§§ 115, 116).

*Promittis*? *promitto*, became the usual words of style in stipulation, unless when coupled with *dare*; so that the debtor in it ordinarily got the name of *promissor* (§ 100, etc.). But there is some reason to believe that originally they amounted to a minor form of oath, *promittere manum* (Serv. *ad Aen.* iv, 103), *porrigere dextram* (Plin. *H. N.* xi, 45, § 250), being to appeal to Fides, whose seat was in the right hand (Liv. i, 21; xxiii, 9; Serv. *ad Aen.* iii, 607).

The simplicity of *dabis*? *dabo*, *facies*? *faciam*, shows them to be of later introduction than the two former. *Dare* meant to give in property (§ 99; iv, 4); *facere* applied to any other act, positive or negative, including giving otherwise than in property (see iv, 2, note 2; fr. 175, fr. 189, fr. 218, D. *de V. S.* i, 16).

*Fidepromitto* (*i.e.* *idem fide mea promitto*), *fideiubeo* (*i.e.* *fide mea iubeo*), were styles used only by sureties, the former when the undertaking of the principal debtor arose from verbal contract, the latter no matter how the principal debtor had contracted (§ 119). The force of them lay in the *tua* and *mea*: *idem fide TVA promittis, iubes*? (§§ 112, 116); *fide MEA promitto, iubeo*.

The phrase 'plighted faith' in the translation seems justified by the *fidem obligare, fidem dare* of the lay writers; see Cic. *Phil.* v, 18, § 51; *Cato maj.* xx, 75; *de off.* xiii, 39; *Plaut. Persa*, v. 242. This *fides*, which Cic. calls *fundamentum iustitiae*, and which he defines as *dictorum conuentorumque constantia et ueritas*, truthfulness in and adherence to one's assurances and agreements (*de off.* i, 7, § 21), was reckoned by the Romans of the Republic the highest of the virtues. To rely upon it was *credere*, a derivative from the sansc. *crat*, trust or belief, and *dhd*, Gr. *ἐς*, to place, (A. W. Schlegel, as quoted by Pernice, i, 409, n. 8). To break it, *fidem fallere*, might not entitle the injured creditor to relief by action if it had been plighted informally, but the defaulter incurred the risk of infamy with all its serious consequences; and thus it was that Rome progressed so long with an imperfect system of contracts. See § 89, note; § 119*a*, note 1.

- 93 FACIES? FACIAM. Sed haec quidem uerborum obligatio DARI SPONDES? SPONDEO propria ciuium Romanorum est; ceterae uero iuris gentium sunt, itaque inter omnes homines, siue ciues Romanos siue peregrinos, ualent; et quamuis ad Graecam uocem expressae fuerint, uelut hoc modo: [Δώσεις; Δώσω 'Ομολογήεις; 'Ομολογῶ Πίστει κελεύεις; Πίστει κελεύω 'Ποιήσεις; Ποιήσω], [etiam haec] tamen inter ciues Romanos ualent, si modo Graeci sermonis intellectum habeant; et e contrario quamuis Latine enuntientur, tamen etiam inter peregrinos ualent si modo Latini sermonis intellectum habeant, at illa uerborum obligatio DARI SPONDES? SPONDEO adeo propria ciuium Romanorum est, ut ne quidem in Graecum sermonem per interpretationem proprie transferri possit,
- 94 quamuis dicatur a Graeca uoce figurata esse.<sup>1</sup> Vnde dicitur uno casu hoc uerbo peregrinum quoque obligari posse, uelut si imperator noster principem alicuius peregrini populi de pace ita interroget: PACEM FVTVRAM SPONDES? uel ipse eodem modo interrogetur: quod nimium subtiliter dictum est, quia si quid aduersus pactionem fiat, non ex stipulatu agitur,

- 93 'I will do.' The verbal obligation by the words *dari spondes?* *spondeo* is peculiar to Roman citizens; the others are *iuris gentium*, and valid between any persons, whether citizens or peregrins. Even when expressed in Greek thus—δώσεις; δώσω ὁμολογήεις; ὁμολογῶ πίστει κελεύεις; πίστει κελεύω ποιήσεις; ποιήσω, they are valid between Roman citizens, provided they understand that language; just as when conceived in Latin they will be binding as between peregrins who understand the Latin language. But the verbal obligation '*dari spondes?* *spondeo*' is so peculiarly Roman that it cannot adequately be rendered in Greek, notwithstanding that the word *spondeo* is said to be
- 94 derived from that language. There is one case, however, in which it is held that this word *spondeo* will impose an obligation even upon a foreigner, namely whom the emperor thus interrogates, or is interrogated, by the sovereign of a foreign state in regard to a treaty of peace: 'Do you religiously engage, *spondes*, to be at peace with us in future?' But this is too ingeniously put; for if there be a violation of the treaty, redress is had by the arbitrament of war and not by an *actio ex stipu-*

§ 93. Comp. §§ 119, 179; § 1, tit. I. afd.; Th. iii, 15, § 1, from which the Greek words, wanting as usual in the ms., are supplied.

<sup>1</sup> Cp. Fest. v. *Spondere* (Bruns, p.

268). The Latin *spondeo*, *sponsio*, were said to be derived from the Greek σπίνδω, σπονδαί, which speaks for their original religious significance.

§ 94. Comp. Liv. ix, §§ 5, 41.



95 sed iure belli res vindicatur. Illud dubitari potest, si quis

— — — — —

96 Sunt et aliae obligationes — — — — —

96a — — — — — iureiurando homines obligantur,

95 *latu.* It may be doubted whether, if a man [*were interrogated* promittis? and *were to answer* ὁμολογῶ, there would [*be any valid obligation.*]

96 There are other verbal obligations [*that may be contracted without any antecedent interrogatory, as when a woman—whether simply affianced and addressing the man she is to marry, or already married and addressing her husband—constitutes a dowry by dotis dictio. She may include in it either moveables or immoveables. And it is not only the woman herself that may be thus laid under obligation; so may her father; and any debtor of hers may also, by dotis dictio addressed to her future husband, give the money he owes her the character of dowry. But these are the only three persons that, without any antecedent interrogatory, can lawfully be bound by dotis dictio. Any other person promising a dowry for a woman can become liable only according to the provisions of the common law; i.e. he must answer to a question, and let his promissio follow a stipulatio.* There is another case in which a verbal

§§ 95, 96. Only a few words are legible on p. 153.

§ 95. K. u. S., relying probably on fr. 1, §§ 2, 6, D. de verb. obl. (xlv, 1), and Th. iii, 15, § 1, think the par. may have run either—*Illud dubitari potest, si quis interroganti 'dare spondes?' respondeat 'promitto' uel 'dabo,' an recte obligetur, or—si quis interroganti 'promittis?' respondeat 'ὁμολογῶ, an recte obligetur.*

§ 96. Gai. seems in this and the next par. to have passed to the description of some other verbal contracts than those created by question and answer; and, from one or two words distinguishable on p. 153, it would appear that he alluded in the first place to *dotis dictio*. Regarding this contract, which had become obsolete before the time of Justinian, we have the following in the Epit. ii, 9, § 3:—*'Sunt et aliae obligationes quae nulla praecedente interrogatione contrahi possunt, id est ut si mulier, siue sponso uxor futura siue iam marito, dotem dicat. Quod tam de mobilibus rebus quam de fundis fieri*

*potest. Et non solum in hac obligatione ipsa mulier obligatur, sed et pater eius et debitor ipsius mulieris, si pecuniam quam illi debebat sponso creditricis ipse debitor in dotem dixerit. Hae tantum tres personae nulla interrogatione praecedente possunt dictione dotis legitime obligari. Aliae uero personae si pro muliere dotem uiro promiserint, communi iure obligari debent, id est ut et interrogata respondeant et stipulata promittant.'* Comp. Ter. Andr. v, 4, vv. 48, 49, and thereon Donat.; Vlp. vi, §§ 1, 2; Vlp. in fr. 19, § 2, D. de aedil. ed. (xxi, 1); Fr. Vat. §§ 99, 100; l. 4, Th. C. de dot. (iii, 13); l. 6, C. de dotis prom. (v, 2).

§ 96a. In the first and undecipherable part of this par., Gai. seems to have referred to the *iurata promissio operarum liberti*, and in the second to have expressed the opinion that, as regards citizens at least, that was the only undertaking that was obligatory simply because fortified with an oath. Says the Epit. ii, 9, § 4:—*'Item et alio casu, uno loquente et*

utique cum quaeritur de iure Romanorum. nam apud peregrinos quid iuris sit, singularum ciuitatum iura requirentes aliud *intelligere poterimus*.<sup>1</sup>

- 97 Si id quod dari stipulamur tale sit ut dari non possit, inutilis est stipulatio, uelut si quis hominem liberum quem seruum esse credebat, aut mortuum quem uiuum esse credebat, aut locum sacrum uel religiosum quem putabat humani iuris esse, dari stipuletur. [*Item si quis rem quae in rerum [natura esse non potest, uelut hippocentaurum, stipuletur,*] aequè
- 98 inutilis est stipulatio. Item si quis sub ea condicione stipuletur quae existere non potest, ueluti 'si digito caelum tetigerit,' inutilis est stipulatio. sed legatum sub impossibili

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[*obligation is contracted by the promise of one of the parties as sole speaker, and not in answer to a question, namely when a freedman gives his oath to his patron that he will make him some present or perform for him certain duties or services,—an obligation, however, that derives its efficacy not so much from the formality of the words used as from the sanctity of the oath that accompanies them. But it is very doubtful whether an oath be obligatory in any other case*], at least so far as the law of Rome is concerned. As regards peregrins, if we were to look into the laws of their particular states, we might possibly find a different rule prevailing.

- 97 If what we have stipulated shall be given to us be such that it cannot be given, the stipulation is useless; as when one stipulates for a freeman whom he believes to be a slave, or for a slave deceased whom he believes to be alive, or for ground sacred or religious which he believes to be of human
- 97a right. *If one stipulate for something that can have no existence, such as a hippocentaur, the stipulation is equally useless.*
- 98 So is one subject to a condition that can never be fulfilled, as 'if he touch the sky with his finger.' The leaders of our

*sine interrogatione alii promittente, contrahitur obligatio, id est si libertus patrono aut donum aut munus aut operas se daturum esse iurauit: in qua re supradicti liberti non tam uerborum solennitate quam iuris iurandi religione retinentur. Sed nulla altera persona hoc ordine obligari potest.*' Comp. § 83; Paul. ii, 32; tit. D. de oper. libertor. (xxxviii, 1); tit. C. de op. lib. (vi, 3).

<sup>1</sup> Stud. thinks there are traces of a few additional letters at the end of

the par.; possibly in *aliis ualere*. Comp. § 120.

§§ 97-109. Comp. tit. I. DE INVTILIBVS STIPVLATIONIBVS (iii, 19). A vacant line before § 97.

§ 97. Comp. Gai. in fr. 1, § 9, D. de O. et A. (xliv, 7); §§ 1, 2, tit. I. afd.

§ 97a. The emendation, suggested by L. and approved by most eds., is made on the authority of § 1, tit. I. afd.

§ 98. Comp. § 11, tit. I. afd.; § 10, I. de hered. inst. (ii, 14).

condicione relictum nostri praeceptores<sup>1</sup> proinde deberi putant ac si siue condicione relictum esset; diuersae scholae auctores<sup>1</sup> non minus legatum inutile existimant quam stipulationem: et sane uix idonea diuersitatis ratio reddi potest.

- 99 Praeterea inutilis est stipulatio si quis, ignorans rem suam esse, dari sibi eam stipuletur: *quippe quod alicuius est*, id ei  
 100 dari non potest. Denique inutilis est talis stipulatio, si quis ita dari stipuletur: POST MORTEM MEAM DARI SPONDES? uel ita: [POST MORTEM TVAM DARI SPONDES? *ualet autem si* [quis ita dari stipuletur: CVM MORIAR, DARI SPONDES? uel ita:] CVM MORIERIS DARI SPONDES? id est ut in nouissimum uitae tempus stipulatoris aut promissoris obligatio conferatur: nam inelegans esse uisum est ab heredis persona incipere obligationem. rursus ita stipulari non possumus: PRIDIE QVAM MORIAR, aut PRIDIE QVAM MORIERIS, DARI SPONDES? quia non potest aliter intellegi 'pridie quam aliquis morietur' quam si mors secuta sit; rursus morte secuta in praeteritum reduci-

school hold that a legacy bequeathed under an impossible condition is as much due as if it had been left unconditionally; those of the other school think the legacy quite as much a nullity as the stipulation; and certainly it is difficult to

- 99 justify the distinction. Further, that stipulation is null in which a man stipulates that something shall be given him, not knowing that it is already his; for what already  
 100 belongs to him cannot be given to him in property. Finally, a stipulation is void that is conceived thus: 'Do you engage that such a thing shall be given me after my death?' or 'after your death?' *It is valid, however, if in such words as: 'Do you engage to give when I am dying?' or 'when you are dying?' i.e. if the obligation be made coincident with the last breath of the stipulant or promiser; for it has been reckoned inconsistent with principle that an obligation should begin in the person of the heir. Again, we cannot stipulate thus: 'Do you engage that it shall be given the day before I die?' or 'the day before you die?' for 'the day before' can be known only after death; but after death the stipulation refers to the past,*

<sup>1</sup> See i, 196, note 1.

§ 99. Comp. Gai. in fr. 1, § 10, D. *de O. et A.* (xliv, 7); iv, 4; §§ 2, 22, tit. I. afd.

§ 100. Comp. §§ 13, 15, tit. I. afd. The emendation here was suggested by Hu. in his *Studien*, p. 279, and has

been approved by all subsequent eds. His principal authorities for it are Gai. ii, 232; fr. 45, §§ 1, 3, fr. 121, § 2, D. *de uerb. obl.* (xlv, i); Fr. Vat. § 98; l. 15, § 1, C. *de contrah. et commit. stip.* (viii, 38); Th. iii, 19, § 14.

- tur stipulatio et quodammodo talis est: HEREDI MEO DARI  
 101 SPONDES? quae sane inutilis est. Quaecumque de morte  
 diximus, eadem et de capitis deminutione dicta intellegemus.  
 102 Adhuc inutilis est stipulatio si quis ad id quod interro-  
 gatus erit non responderit, ueluti si sestertia x a te dari  
 stipuler et tu sestertia v promittas, aut si ego pure stipuler,  
 103 tu sub condicione promittas. Praeterea inutilis est stipu-  
 latio si ei dari stipulemur cuius iuri subiecti non sumus:  
 unde illud quaesitum est, si quis sibi et ei cuius iuri subiectus  
 non est dari stipuletur, in quantum ualeat stipulatio: nostri  
 praeceptores<sup>1</sup> putant in uniuersum ualere, et proinde ei soli  
 qui stipulatus sit solidum deberi, atque si extranei nomen non

- and is equivalent to this: 'Do you engage that it shall be  
 101 given to my heir?' which undoubtedly is invalid. These  
 observations about death apply equally to *capitis deminutio*.  
 102 A stipulation is likewise void if the answer do not corre-  
 spond to the question; for instance, if, when I stipulate for  
 ten *sestertia*, you promise five, or if, when I stipulate purely,  
 103 you promise conditionally. Again, a stipulation is null in  
 which we stipulate that a thing shall be given to a person to  
 whose right we are not subject. Hence the question,—sup-  
 pose a man stipulates for something to be given to himself  
 and another person to whom he is not subject, how far is the  
 stipulation valid? Our authorities think that it is good to  
 the full, and that the debt is due *in solidum* to the stipulant,

§ 101. Comp. § 153.

§ 102. Comp. Epit. ii, 9, §§ 8–10; § 5, tit. I. afđ. The ms. reads—*ettunce-sterciaũ . milia promittas*, which is generally rendered as above, the *n* after *tu* and the *milia* being deleted as accidental interpolations.

Thus rendered, however, the doctrine—supported by the Epit. and Just. Inst.—is in disaccord with the statements of Vlp. in fr. 1, § 4, and Paul. in fr. 83, § 3, D. *de uerb. obl.* (xlv, 1), where it is laid down that a promise for five in response to a stipulation for ten was effectual for the smaller sum.

Hu. (*Beitraege*, p. 62) maintains that if the *n* and the *milia* of the ms. be retained, the *sestertia* changed into *sestertium*, and the passage read *et tu nummum sestertium v milia promittas*, the contrariety between Gai. on the one hand, and Paul. and

Vlp. on the other, will disappear. For then, he argues, there would be a difference not as to the quantity but as to the *thing* the parties were bargaining about; a *sestertium*, though of the value of a thousand *nummi sestertii*, being not money at all, but a certain weight (2½ pounds) of silver.

Had the contrariety between the *x* and the *v* of the text not existed, there might have been more to say for this ingenious suggestion. But there can be no doubt that in ordinary language *sestertia decem* and *nummum sestertium decem milia* were synonymous; and whether the reading of Hu. or that given above be adopted, the statement of Gai. is still the same. As to how it may be reconciled with those of Paul. and Vlp., see note to § 5, tit. I. afđ.

§ 103. Comp. § 4, tit. I. afđ.

<sup>1</sup> See i, 196, note 1.



- adiecisset: sed diuersae scholae auctores <sup>1</sup> *dimidium ei* debere existimant, pro altera uero *parte inutilem esse* stipulationem. Alia causa est — — — — dari spondes — — — — — solidum deberi, *et me* — — — — — etiam *Titio* — — — — —  
 104 — — .<sup>2</sup> (*Item*) inutilis est stipulatio si ab eo stipuler qui iuri meo subiectus est, item si is a me stipuletur. [*sed*] seruus quidem, et qui in mancipio est, et (*filiafamilias*), et quae in manu est, non solum ipsi *cuius iuri subiecti subiectaeue* sunt  
 105 obligari non possunt, sed ne alii quidem ulli. Mutum neque stipulari neque promittere posse palam est. idem etiam in surdo receptum est; quia et is *qui stipulatur* uerba promittentis, et qui *promittit uerba stipulantis* exaudire debet.  
 106 Furiosus nullum negotium *gerere* potest, quia non intellegit  
 107 quid agat. Pupillus omne negotium recte gerit, ut tamen,<sup>1</sup>

- just as if the stranger's name had not been added; those of the other school hold that one half is due to the stipulant, but the stipulation void as to the other half. The case is different where you engage to give [*to me or Titius; 'for then*] the whole is due to me, [*and I alone can sue upon the stipulation, although by payment*] to Titius [*you will be effectually discharged*].  
 104 Further, a stipulation is useless in which I take a promise from one who is subject to my right, or he takes a promise from me; indeed, slaves, persons *in mancipio*, *filiae-familias*, and women *in manu*, are not only incapable of becoming obliged to him to whose right they are subject, but  
 105 cannot be obliged to any other person. That mutes can neither stipulate nor promise is quite plain. The same is the rule as regards a person who is deaf; for the stipulant must hear the words of the promiser, and the promiser those of the  
 106 stipulant. A madman cannot be a party to any business-matter, because he does not understand what he is about.  
 107 But all sorts of business affairs may be legally transacted by a

<sup>2</sup> Three lines and a half to a great extent illegible. Hu. conjectures—*Alia causa est, si ueluti 'seruo uel filiofamilias meo et mihi dari spondes?' stipulatus sim. tunc enim constat solidum deberi, et me solidum a promissore petere posse: quod etiam fit cum tantum uelut 'filiofamilias' stipulor.* K. u. S. suggest—*Alia causa est, si ita stipulatus sim: 'mihi aut Titio dari spondes?' quo casu constat mihi solidum deberi, et me solum ex ea stipulatione agere*

*posse, quamquam etiam Titio soluendo liberaris.*

§ 104. Comp. § 6, tit. I. afd., from which it will be seen that a *filius-familias* might.

§ 105. Comp. Gai. in fr. 1, §§ 14, 15, D. de O. et A. (xlv, 7); § 7, tit. I. afd.

§ 106. § 8, tit. I. afd. Comp. Gai. in fr. 1, § 12, D. de O. et A. (xlv, 7).

§ 107. § 9, tit. I. afd. Comp. ii, 83; iii, §§ 119, 176.

<sup>1</sup> Hu., following L., reads *ita tamen ut tutor.*

- sicubi tutoris auctoritas necessaria sit, adhibeatur, ueluti si ipse obligetur; nam alium sibi obligare etiam sine tutoris auctoritate potest. Idem iuris est in feminis quae in tutela sunt. Sed quod diximus de pupillo, utique de eo uerum est qui iam aliquem intellectum habet; nam infans et qui infanti proximus est non multum a *furioso* differt, quia huius aetatis pupilli nullum intellectum habent: sed in his pupillis propter utilitatem benignior iuris interpretatio facta est.
- Possumus tamen ad id quod stipulamur alium adhibere qui idem stipuletur, quem uulgo adstipulatorem uocamus. Huic proinde actio competit proindeque ei recte soluitur ac nobis; sed quidquid consecutus erit mandati iudicio nobis restituere cogetur. Ceterum potest etiam aliis uerbis uti adstipulator quam quibus nos uti sumus: itaque si uerbi gratia ego ita stipulatus sim: DARI SPONDES? ille sic adstipulari potest: IDEM FIDE TVA PROMITTIS? uel IDEM FIDEIVEES?

- pupil, provided that, where tutorial authorization is required, his tutor has intervened, as when he is undertaking an obligation; for he may take another person bound to him without his tutor's *auctoritas*. The law is the same in the case of women in tutelage. But what has been said about a pupil applies only to one who has some intelligence; for an infant, or a child approximating to infancy, is little different from a lunatic, pupils of such age having no understanding; yet even in their case, for utility's sake, the law is favourably interpreted.
- It is in our power, in entering into a stipulation, to conjoin with us a third party, who stipulates in the same terms as we have done; such a person is commonly called an *adstipulator*. Action is competent to him on the stipulation, and payment of what is stipulated for may as effectually be made to him as to us; but whatever he has recovered he may be compelled to make over to us by means of an *actio mandati*. The adstipulator need not use the very same words that we have used; for example, if a stipulant have employed the formula *spondes?* he may use *fide tua promittis?*

§ 108. Comp. i, 192; iii, §§ 119, 176.

§ 109. § 10, tit. I. afd. Comp. Gai. in fr. 1, § 13, D. *de O. et A.* (xliv, 7). A vacant line intervenes in the ms. between this and the next par.

§§ 110-114. These pars. deal with *adstipulatio*, whose ordinary purpose

is explained in § 117. They have no counterpart in the Inst., Just. having rendered the device unnecessary by tit. C. *ut act. ab hereditib. et contra hered. incipiant* (iv, 11).

§ 111. Comp. §§ 117, 155, 215.

- 113 uel contra. Item *minus*<sup>1</sup> adstipulari potest, [plus non potest:]<sup>2</sup> itaque si ego sestertia x stipulatus sum, ille sestertia v stipulari potest; contra uero plus non potest. item si ego pure stipulatus sim, ille sub condicione stipulari potest; contra uero non potest. non solum autem in quantitate sed etiam in tempore minus et plus intellegitur; plus est enim  
 114 statim aliquid dare, minus est post tempus *dare*.<sup>3</sup> In hoc autem iure quaedam singulari iure obseruantur: nam adstipulatoris heres non habet actionem.<sup>1</sup> item seruus adstipulando nihil agit, *quamuis*<sup>2</sup> ex ceteris omnibus causis stipulatione domino adquirat.<sup>3</sup> idem de eo qui in mancipio est magis placuit; nam et is serui loco est: is autem qui in potestate patris est agit aliquid, sed parenti non acquirit, quamuis ex omnibus ceteris causis stipulando ei adquirat; ac ne ipsi quidem aliter actio competit quam si sine capitis deminutione exierit de potestate parentis,<sup>4</sup> ueluti morte eius aut quod ipse

- 113 or *fideiubes*? and *vice versa*. He may stipulate for less, but not for more. Therefore if I have stipulated for ten *sestertia*, he may limit his stipulation to five; but he cannot go beyond the ten. So, if I have stipulated purely, he may stipulate conditionally; but not contrariwise. And more or less may depend upon time as well as quantity: to give a thing at once is to give more; to give it after a while is to  
 114 give less. In this branch of the law there are some peculiarities. Thus, an adstipulator's heir cannot sue upon the contract. Adstipulation by a slave is of no avail, although in all other cases of stipulation he thereby acquires for his owner. The same rule holds in regard to a person *in mancipio*; for he is in the position of a slave. A son, however, who is in the power of his father, may effectually adstipulate, yet does not thereby acquire anything for his father, although he does so in every other case of stipulation; and no action on the adstipulation is competent to such a *filiusfamilias* until he has passed out of his parent's *potestas* without *capitis deminutio*, as, for instance, by his father's death or his own

§ 113. <sup>1</sup>The ms. has *marginus*. The copyist has introduced into the middle of the word the letters *rg* = *regula*, which he had found noted on the margin of the archetype. See the same error in i, 53, and iii, 126.

<sup>2</sup> These words seem to be a gloss.

<sup>3</sup> Comp. iv, 53; § 5, tit. I. *de fideiuss.* (iii, 20).

§ 114. <sup>1</sup>Comp. iv, 18.<sup>12</sup>

<sup>2</sup> So G. and K. u. S.; the ms. has *quia*.

<sup>3</sup> Comp. ii, 87; iii, 163; § 1, I. *de stip. seru.* (iii, 17).

<sup>4</sup> Comp. i, §§ 127, 130.

flamen Dialis inauguratus est. eadem de filiafamilias et quae in manu est dicta intellegemus.

- 115 Pro eo quoque qui promittit solent alii obligari, quorum  
 alios sponsores, alios fidepromissores, alios fideiussores appel-  
 116 lamus. Sponsor ita interrogatur: IDEM DARI SPONDES?  
 fidepromissor [*ita*]: IDEM FIDEPROMITTIS? fideiussor ita: IDEM  
 FIDE TVA ESSE IVBES? uidebimus<sup>1</sup> [de his]<sup>2</sup> autem<sup>3</sup> quo  
 nomine possint proprie appellari qui ita interrogantur: IDEM  
 117 DABIS? IDEM PROMITTIS? IDEM FACIES? Sponsores quidem  
 et fidepromissores et fideiussores saepe solemus accipere dum  
 curamus ut diligentius nobis cautum sit; adstipulatorem uero  
 fere tunc solum adhibemus cum ita stipulamur ut aliquid  
 post mortem nostram detur.<sup>1</sup> [*ita*]<sup>2</sup> stipulando nihil agimus;<sup>3</sup>  
 adhibetur autem adstipulator ut is post mortem nostram

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inauguration as a flamen of Jupiter. And the same rules are to be understood as applying to a *filiafamilias* and a woman *in manu*.

- 115 For him who promises other persons frequently become  
 bound, of whom some are called sponsors, others fidepromis-  
 116 sors, others fidejussors. A sponsor is interrogated thus:  
 'Do you religiously engage that the same thing shall be  
 given?' a fidepromissor: 'Do you promise the same on  
 your plighted faith?' a fidejussor: 'Do you authorize the  
 same thing on your plighted faith?' How those are called  
 who are interrogated thus: 'Will you give the same?' 'Do  
 you promise the same?' 'Will you do the same?' we shall  
 117 see by and by. We often take sponsors, fidepromissors,  
 or fidejussors when we are anxious to have an undertaking to  
 us better secured; but we hardly ever associate with us an  
 adstipulator except when we are stipulating for something to  
 be given after our death. So stipulating our act is useless;  
 therefore we conjoin with us an adstipulator that he may sue

§§ 115-127. Comp. tit. I. DE FIDEIVS-  
 SORIBVS (iii, 20).

§ 115. A vacant line before this par.  
 Comp. Paul. i, 9, § 5; pr. tit. I. afd.

§ 116. Comp. § 92, note; Epit. ii, 9,  
 § 2; § 7, tit. I. afd.

<sup>1</sup> Gai. does not recur to the sub-  
 ject; but such persons went by the  
 generic name of *adpromissores*.

<sup>2</sup> Apparently a gloss.

<sup>3</sup> Hu. has *an aliquo*.

§ 117. Comp. Gai. in fr. 1, § 8, D. *de*  
*O. et A.* (xlv, 7); pr. tit. I. afd.

<sup>1</sup> Comp. §§ 110-114.

<sup>2</sup> Instead of *ita* Hu. introduces  
 the words *quia enim ut ita nobis*  
*detur*.

<sup>3</sup> Comp. § 100.



agat : qui si quid fuerit consecutus, de (*restituendo*) eo mandati iudicio heredi *meo* tenetur.<sup>4</sup>

- 118 Sponsoris uero et fidepromissoris similis condicio est, fide-  
 119 iussoris ualde dissimilis. Nam illi quidem nullis obligationibus accedere possunt nisi uerborum, quamuis interdum ipse qui promiserit non fuerit obligatus, uelut si (*mulier*) aut pupillus sine tutoris auctoritate,<sup>1</sup> aut quilibet post mortem suam,<sup>2</sup> dari promiserit; (at illud quaeritur, si seruus aut peregrinus sponderit,<sup>3</sup> an pro eo sponsor aut fidepromissor  
 119a obligetur.) Fideiussor uero omnibus obligationibus, id est siue re siue uerbis siue litteris siue consensu contractae fuerint obligationes, *adici* potest. *ac* ne illud quidem interest utrum ciuilis an naturalis obligatio<sup>1</sup> sit cui adiciatur; adeo

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after our death, who is bound by an *actio mandati* to make over to our heir whatever he may have recovered.

- 118 The positions of sponsor and fidepromissor are much the  
 119 same, but that of a fidejussor is materially different. The former cannot become accessory to any but a verbal obligation. [And they are bound even] although, as sometimes happens, the original promiser is not,—a woman, for instance, or a pupil, promising without tutorial *auctoritas*, or any person whatever promising that something shall be given after his death. But if a slave or a peregrin have promised by the formula *spondeo*, it is questionable whether a sponsor  
 119a or fidepromissor can become bound for him. A fidejussor, on the other hand, may be superadded to an obligation of any sort, whether contracted by thing done, by spoken words, by writing, or by consent. And it is immaterial whether the obligation to which he accedes be civil or natural; he may

<sup>4</sup> Comp. §§ 215, 216.

§ 119. Comp. § 1, tit. I. afd.

<sup>1</sup> Comp. §§ 107, 108.

<sup>2</sup> Comp. §§ 100, 117.

<sup>3</sup> The *sponsio* of a peregrin or a slave was an absolute nullity, engagement in that form being competent only to citizens, § 93.

§ 119a. Comp. § 1, tit. I. afd.

<sup>1</sup> A civil obligation was enforceable directly by action at the instance of the creditor in it; a natural obligation was one that, by reason of absence of formalities, defect in the capacity of the individual, or other *ciuilis ratio*, was not enforceable by action, though recognised as a *vinculum aequitatis* (Papin. in

fr. 95, § 4, D. *de solut.* xlv, 3), and held consequently to be a sufficient foundation for an accessory undertaking by a *fideiussor* (as above), or for a real security (fr. 5, pr. D. *de pign.* xx, 1); as a sufficient answer to a *condictio indebiti* (fr. 16, § 4, D. *de fidej.* xlv, 1); as pleadable in compensation (fr. 6, D. *de comp.* xvi, 2); as a good basis for a *constitutum* (fr. 1, § 7, D. *de pec. const.* xiii, 5), or a novation (fr. 1, § 1, D. *de nou.* xlv, 2); and as in many cases affording an effectual equitable exception to an action by the other party (fr. 7, § 7, D. *de pact.* ii, 14).

- quidem ut pro seruo quoque obligetur, siue extraneus sit qui a seruo fideiussorem accipiat, siue ipse dominus in id quod sibi  
 120 debeatur.<sup>2</sup> Praeterea sponsoris et fidepromissoris heres non tenetur, nisi si de peregrino fidepromissore quaeramus et alio iure ciuitas eius utatur;<sup>1</sup> fideiussoris autem etiam heres  
 121 tenetur.<sup>2</sup> Item sponsor et fidepromissor lege Furia biennio liberantur, et quotquot erunt numero eo tempore quo pecunia peti potest, in tot partes diducitur inter eos obligatio, et singuli uiriles partes *dare iubentur*;<sup>1</sup> fideiussores uero <sup>2</sup> per-

- become bound even for a slave, whether it be a stranger that is taking him as fidejussor, or the owner of the slave in respect of what the latter owes him. Besides, the heir of a sponsor or fidepromissor is not bound, unless in the case of a peregrin fidepromissor in whose country a different rule is followed; but a fidejussor's heir is as much bound as himself.  
 121 Further, sponsors and fidepromissors are freed from liability after two years, in terms of the Furian law; and, whatever be their number when the debt is sued for, the obligation is divided into just so many parts, and each has to pay an equal share. But fidejussors are bound for ever, and, what-

<sup>2</sup> Comp. Gai. in fr. 70, § 3, D. *de fideiuss.* (xlvii, 1).

§ 120. Comp. iv, 113.

<sup>1</sup> Comp. § 96.

<sup>2</sup> Comp. § 2, tit. I. afl.

§ 121. The *L. Furia de sponsu* (iv, 22) is assigned by Rudorff (*R. RG.* i, p. 51) to the year 409 | 345; by Hu. to the beginning of the fifth century of the city; by Voigt (*Ius Nat., etc.*, iv, p. 424) to 536 | 218; by Bruns (*Z. f. RG.* xii, 134) to the second half of the sixth century; and by Appleton (*Étude sur les sponsores, etc.*, *Rev. de Législat.*, 1876, p. 558) to 654 | 100 or 655 | 99.

Huschke's reason (*Beitraege*, p. 83) for assigning it so early a date is that both it and the *L. Publilia* (§ 127) authorized a *legis actio per manus iniunctionem pro iudicato* (iv, 22); and therefore they must have been earlier than the *L. Valeria* of 413 | 341, which declared that every *manus iniectio*, except in the cases of *iudicatum* and *depensum*, should be *pura* (iv, 25).

It now appears, however, from

Studemund's *Apographum*, that it was not a *lex Valeria* but a *lex Vallia* that made this change, and of its authorship and precise date we are ignorant; all we know (iv, §§ 24, 25) is that it was subsequent to the *L. Furia*.

But Bruns draws attention to the fact that in an inscription edited by Mommsen (*Ephem. Epigraph.* ii, 198), and which he attributes to the first half of the sixth century of the city, *man. iniectio pro iudicato* is authorized as the means of recovering certain penalties thereby imposed; whence he argues that the *L. Vallia* must have been later.

As regards the *L. Furia* in particular, Bruns concludes from internal evidence that it must have been later than the *L. Cincia*, which dates from 550 | 204.

<sup>1</sup> So Hu.; the ms. has *hocabentur*. K. u. S., interpolating *in* before *uiriles*, make it *obligantur*,—a reading against which Hu. protested by anticipation in his *Beitraege*, p. 88.

<sup>2</sup> Comp. § 4, tit. I. afl.

petuo tenentur, et quotquot erunt numero singuli in solidum obligantur: *itaque liberum est creditori a quo (uelit) solidum petere*: sed *nunc ex epistula diui Hadriani (compellitur) creditor a singulis qui modo soluendo sint partes petere*. eo igitur distat haec epistula a lege Furia, quod si quis ex sponsoribus aut fidepromissoribus soluendo non sit, hoc onus ad [ceteros  
 121a[*non pertinet; sed ex fideiussoribus etsi unus tantum soluendo sit, ad eum onus*]<sup>3</sup> ceterorum quoque pertinet. Sed cum lex Furia tantum in Italia locum habeat, euenit *ut in ceteris provinciis* sponsores quoque et fidepromissores proinde ac fideiussores in perpetuum teneantur et singuli in solidum obligentur, nisi ex epistula diui Hadriani hi quoque *adiuuen-*  
 122*tur* in parte. Praeterea inter sponsores et fidepromissores lex *Apuleia* quandam societatem introduxit: nam si quis *horum plus* sua portione soluerit, de eo quod amplius dederit aduersus ceteros *actiones* constituit. quae lex ante legem Furiam lata est, quo tempore in solidum obligabantur. unde

ever be their number, are liable each for the whole; so that it is free to the creditor to sue any one he pleases for the whole amount. Now however, by a letter of our late emperor Hadrian's, a creditor is compelled to limit his demand against each of them who is solvent to a proportionate share of the whole. The provision in this letter differs from that of the Furian law to this extent,—that if any of several sponsors or fidepromissors be insolvent, the burden *upon the others is not thereby increased, whereas, should only one of several fidejussors be solvent, he has to bear the burden of those*  
 121a*that are insolvent*. But as the Furian law is in force only in Italy, it follows that in the provinces sponsors and fidepromissors, in the same way as fidejussors, are liable for ever, and each for the whole; unless it be held that these last also  
 122have partial relief under the letter of Hadrian. Moreover, the Apuleian law introduced a kind of partnership between sponsors and fidepromissors; for if any one of them had paid more than his share, it allowed him action against the others for the excess. But this law was enacted before the Furian, and at a time when the liability was *in solidum*. It is therefore a question whether the boon conferred by the

<sup>3</sup> This addition is Mommsen's in K. u. S.; Hu. reads—*hoc onus [ad ceteros non pertinet, si uero ex fideiussoribus], ad ceteros quoque pertinet*.

§ 122. Comp. § 4, tit. I. afd. Rudorff and Hu. attribute the *lex Apuleia* to 364 | 390; Voigt to 524 | 230; and Appleton to 652 | 102.

quaeritur an post legem Furiam adhuc legis Apuleiae beneficium supersit: et utique extra Italiam superest; nam lex quidem Furia tantum in *Italia* ualet, Apuleia uero etiam in ceteris prouinciis: *sed an et in Italia*<sup>1</sup> beneficium legis Apuleiae supersit ualde quaeritur. (*Ad fideiussores autem (lex)* Apuleia non pertinet: itaque si creditor ab uno totum consecutus fuerit, huius solius detrimentum erit, scilicet si is pro quo fideiussit soluendo non sit: (*sed ut ex*) supra dictis apparet, is a quo creditor totum petit poterit ex epistula diui

- 123 Hadriani desiderare ut pro parte in se detur actio. Praeterea lege Cicereia cautum est, ut is qui sponsores aut fidepromissores accipiat, praedicat palam et declaret et de qua re satis accipiat, et quot sponsores aut fidepromissores in eam obligationem accepturus sit; et nisi praedixerit, permittitur sponsoribus et fidepromissoribus intra diem xxx praeiudicium<sup>1</sup> postulare, quo quaeratur an ex ea lege praedictum sit; et si iudicatum fuerit praedictum non esse, liberantur. qua lege

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Apuleian law has survived the Furian. Certainly it survives out of Italy; for while the Furian law applies only in Italy, the Apuleian extends to the provinces generally; but whether or not it survives in Italy is extremely doubtful. The enactment does not apply, however, to fidejussors; consequently, if a creditor have obtained payment of the whole debt from one of several fidejussors, that one, if the party for whom he has become surety be insolvent, has to bear the whole loss. But then, as is manifest from what has been already said, a surety from whom a creditor seeks payment of the whole debt may require that action against him be limited to

- 123 his share, in accordance with Hadrian's letter. Then again it is provided by the Cicereian law that any one accepting sponsors or fidepromissors shall first openly state and declare what is the matter in respect of which he is taking security, and how many sponsors or fidepromissors he proposes to have; if he fail in this, the sponsors and fidepromissors may at any time within thirty days demand a praejudiciary inquiry as to whether or not the provisions of the enactment have been complied with; and if the judgment be that no such declaration had been made, they are discharged of lia-

<sup>1</sup> The ms. has *set an etiam alis*.

§ 123. The only Cicereius we read of was praetor in 581 | 173. The name of

this law appears for the first time in Stud. *Apograph*.

<sup>1</sup> Comp. iv, 44.



fideiussorum mentio nulla fit: sed in usu est, etiam si fideiussores accipiamus, praedicere.

- 124 Sed beneficium legis Corneliae omnibus commune est: qua lege idem pro eodem apud eundem eodem anno uetatur in ampliorem summam obligari creditae pecuniae quam in xx milia; et quamuis sponsor uel fidei promissor<sup>1</sup> in *ampliorem*<sup>2</sup> pecuniam, ueluti si sestertium c milium [*se obligauerit, tamen [duntaxat xx damnatur]*;<sup>3</sup> pecuniam autem creditam<sup>4</sup> dicimus non solum eam quam credendi causa damus, sed omnem quam tum cum contrahitur obligatio certum est debitum iri, id est [*quae*] sine ulla condicione deducitur in obligationem; itaque et ea pecunia quam in diem certum dari stipulamur eodem numero est, quia certum est eam debitum iri, licet post tempus petatur. appellatione autem pecuniae<sup>5</sup> omnes res in ea lege significantur; itaque si uinum uel frumentum, etiam si fundum
- 125 uel hominem stipulemur, haec lex obseruanda est. Ex

bility. In this enactment no mention is made of fidejussors; but it is the practice to make a declaration even in their case.

- 124 The relief conferred by the Cornelian law, however, is common to all classes of sureties. By this law the same person is forbidden to become bound for the same debtor, to the same creditor, and in the same year for more than 20,000 sesterces of *credita pecunia*; and although a sponsor, fidepromissor, or *fidejussor*, may have bound himself for more, say for 100,000, yet judgment against him will be limited to 20,000. By *pecunia credita* we mean not only money advanced in loan, but all that, at the time of contracting the obligation, we are certain will become a debt, i.e. all that is unconditionally made matter of obligation; and there is thus included in it money which we stipulate is to be paid at a time fixed, because it is certain that such money will fall due, although it can be sued for only when the time of payment has arrived. And by *pecunia*, in the sense of the Cornelian law, we are to understand every sort of thing; therefore, even if we are stipulating for wine or corn, for land or for a slave, the rule of
- 125 the statute is to be obeyed. In some cases, however, it allows

§ 124. The *lex Cornelia (de sponsoribus)* Hu. thinks may have been enacted in 673 | 81; but Voigt attributes it to 427 | 327.

<sup>1</sup> So the ms.; Hu. reads *uel promissores [uel fideiussores]*.

<sup>2</sup> Instead of *ampliorem* the ms. has *amplam*.

<sup>3</sup> The addition is Huschke's, adopted substantially by K. u. S.

<sup>4</sup> Comp. Isidor. *Orig.* v, 25, § 14 (Bruns, p. 302); fr. 37-39, D. *de reb. cred.* (xii, 1).

<sup>5</sup> Comp. fr. 178, pr., fr. 222, D. *de V. S.* (1, 16).

§ 125. The *lex Iulia de vicesima* here-

- quibusdam tamen causis permittit ea lex in infinitum satis accipere, ueluti si dotis nomine, uel eius quod ex testamento tibi debeatur, aut iussu iudicis satis accipiatur. et adhuc lege uicesima hereditatium cauetur, ut ad eas satisfactiones quae
- 126 ex ea lege proponuntur lex Cornelia non pertineat. In eo quoque iure par condicio est omnium, sponsorum, fidepromissorum, fideiussorum, quod ita obligari non possunt ut plus debeant<sup>1</sup> quam debet is pro quo obligantur: at ex diuerso ut minus debeant obligari possunt, sicut in adstipulatoris persona diximus; nam ut adstipulatoris ita et horum obligatio accessio est principalis obligationis, nec plus in
- 127 accessione esse potest quam in principali re. In eo quoque par omnium causa est, quod si quid pro *reo* soluerint, eius recipiendi causa habent cum eo mandati iudicium;<sup>1</sup> et hoc amplius sponsores ex lege Publilia<sup>2</sup> propriam habent actionem in duplum, quae appellatur *depensi*.<sup>3</sup>

- security to be taken to any extent, as when it is given on account of a dotal provision, or of a debt due under a testament, or when it is required by order of a judge. Further, the law imposing a five per cent. succession duty exempts the suretyships it calls into play from the operation of the Cornelian law.
- 126 In this respect also all are on a par, whether sponsors, fidepromissors, or fidejussors,—that they cannot be bound for more than is due by him for whom they are sureties; but, on the other hand, they may be bound for less, as explained in reference to an adstipulator; for, like the obligation of an adstipulator, that of a surety is accessory to the principal one, and there cannot be more in the accessory than in the
- 127 principal. Finally, they all stand on the same footing in this respect,—that if they have paid anything for the principal debtor, they have an action of mandate against him for its recovery; and sponsors, by the Publilian law, have over and above an action peculiar to themselves for double the amount, which goes by the name of *actio depensi*.

*ditatum*, enacted 759 | 6, imposed a duty of 5 per cent. on testamentary successions and bequests; Dio Cass. lv, 25, lvi, 28; Plin. *Paneg.* 37.

§ 126. Comp. 113; § 5, tit. I. *afd.*

<sup>1</sup> The ms. again has *ut rg plus debeant*, the scribe having intro-

duced a marginal *rg*, = *regula*, into his text. See § 113, note.

§ 127. Comp. § 6, tit. I *afd.*

<sup>1</sup> Comp. § 111.

<sup>2</sup> This law was enacted possibly in 355 | 399, or more probably in 371 | 383.

<sup>3</sup> Comp. iv, 22.

128 Litteris obligatio fit ueluti nominibus transscripticiis. fit  
autem nomen transscripticium duplici modo, uel a re in  
129 personam uel a persona in personam. [*A re in personam*  
[*trans*]scriptio fit, ueluti si id quod ex emptionis causa aut  
conductionis aut societatis mihi debeas, *inde*<sup>1</sup> expensum tibi  
130 tulero. A persona in personam transscriptio fit, ueluti si  
id quod mihi Titius debet tibi *inde*<sup>1</sup> expensum tulero, id est  
131 si Titius te<sup>2</sup> delegauerit<sup>3</sup> mihi. Alia causa est eorum  
nominum quae arcaria uocantur: in his enim rei, non littera-  
rum obligatio consistit, quippe non aliter ualent quam si

128 A literal obligation is created by transcribed entries; and  
these are made in two ways,—either from thing to person, or  
129 from person to person. *There is transcription from thing to*  
*person* when, for example, I enter to your debit a sum you  
already owe me by reason of a purchase, a conduction, or a  
130 partnership. *There is transcription from person to person*  
when, for example, I enter to your debit what is due me by  
Titius, provided always he has delegated you to me in his  
131 stead. The case is different with those [direct] entries [of  
cash payments] which go by the name of *nomina arcaria*.  
In these the obligation is really one created by thing delivered  
rather than by writing, seeing it has no effect unless the

§ 128-134. Comp. tit. I. *DE LITTERARVM OBLIGATIONE* (iii, 21). That title refers to a different sort of literal obligation from any of those explained by Gai. in these pars., all of which had gone out of use before the time of Justinian. Th., however, alludes to them, and gives some details of interest in reference to that mentioned in § 129.

§ 128. The *transscriptio* here referred to took place in the *codex expensi et accepti*, which, so long as the periodical census was regularly observed, every citizen was required to keep; see Ps. Ascon. in *II. Verr.* i, 23, § 60 (Bruns, p. 292). Danz (*R.R.* ii, pp. 43-61) gives a *resumé* of the principal theories broached in reference to the Roman house-books, and the *nomina* they contained.

§ 129. The words in italics are omitted in the ms., but self-evident. In reference to the par. generally, comp. §§ 137, 138; Cic. *de off.* iii, 14, §§ 58-60; *pro Q. Rosc. com.*

i-iii; Sen. *de benef.* ii, 23, iii, 15; Th. iii, 21. Heimbach (*Creditum*, p. 329), criticising Reitz's text of Theoph., draws attention to the fact that, in his account of the *lit. obligatio* as contained in the most authoritative mss., there are preserved—not in a Greek dress, but in the original Latin—two formulae which are said to have been both spoken and written by the parties; by the creditor—*centum aureos quos mihi ex causa locationis debes expensos tibi tuli?* and by the debtor—*expensos mihi tulisti*.

<sup>1</sup> So Hu.; the ms. has *id*.

§ 130. See references in note to § 128.

<sup>2</sup> So Hu.; the ms. has *id*.

<sup>3</sup> The ms. has *te se*; Hu. *te [pro] se*.

<sup>3</sup> Comp. Vlp. in fr. 11, pr. D. *de nouat.* (xlv, 2).

§ 131. A loan *ex arca*, paid in cash out of the household money-chest, became a *nomen arcarium* when booked in the lender's *codex*.

numerata sit pecunia; numeratio autem pecuniae rei facit obligationem: qua de causa recte dicemus arcaria nomina nullam facere obligationem, sed obligationis factae testimoni-  
 132 monium praebere. Vnde proprie dicitur arcariis nominibus etiam peregrinos obligari, quia non ipso nomine sed numeratione pecuniae obligantur, quod genus obligationis iuris  
 133 gentium est. transscripticiis uero nominibus an obligentur peregrini merito quaeritur, quia quodammodo iuris ciuilis est talis obligatio: quod Neruae<sup>1</sup> placuit: Sabino<sup>1</sup> autem et Cassio<sup>1</sup> uisum est, si a re in personam fiat nomen transscripticium, etiam peregrinos obligari; si uero a persona in  
 134 personam, non obligari. Praeterea litterarum obligatio

money has actually been told; but the paying down of money is creative of a real obligation; therefore it may be said with perfect accuracy that an entry of a cash payment does not  
 132 make an obligation, but only afford evidence of one already created. Hence it may be said quite properly even that peregrins are bound by *arcaria nomina*; for they are bound not by the entry, but by the paying down of the money,—  
 133 a cause of obligation which is *iuris gentium*. Whether they can be bound by transcribed entries has very reasonably been questioned; for an obligation so created is in a manner an invention of the *ius ciuile*. Nerva was of opinion that they could not; but Sabinus and Cassius hold that they may be bound by transcription from thing to person, though not  
 134 by that from person to person. Further, a *litterarum obli-*

§ 132. P. places *etiam* after *unde* instead of after *nominibus*. Hu. (*Beitraege*, p. 94), followed by Bk. and K. u. S., interjects *non* before *proprie*, on the ground that if an *arcarium nomen* did not create any obligation at all (§ 131), it could not be obligatory on a peregrin. But Gai. says in the same sentence—in *arcariis nominibus rei . . obligatio consistit*. Consequently I prefer to keep the text as it is, believing that Gaius meant here to distinguish between the recognised liability of a peregrin upon a *nomen arcarium* as a real and *iuris gentium* contract, and the doubtfulness of his liability upon a *nomen transscripticium* as a literal and *iuris ciuilis* one.

§ 133. The new obligation arising from *transscriptio a persona in personam*

had no foundation except in the *ius ciuile*; where the *transscriptio* was a *re in personam* the foundation of the prior *iuris gentium* obligation, thus novated, still remained.

<sup>1</sup> See i, 196, note 1.

§ 134. Comp. Cic. *ad Att.* v, 21, vi, 2; Ps. Ascon. in *II. Verr.* i, 36, § 91 (Bruns, p. 293). The *chirographum* of the Greek provinces was a written acknowledgment of debt under the hand of the debtor, and was obligatory upon him, if a peregrin, for the simple reason that amongst peregrins a *nudum pactum* was creative of action; if, however, he was a citizen, it was obligatory in the first instance only if it embodied a stipulation, and therefore as a *uerborum obligatio*, though capable of becoming in time a *litterarum obli-*



fieri uidetur chirographis et syngraphis, id est si quis debere se aut daturum se scribat, ita scilicet si eo nomine stipulatio non fiat: quod genus obligationis proprium peregrinorum est.

- 135 Consensu fiunt obligationes in emptionibus et uenditionibus, locationibus conductionibus, societatibus, mandatis.  
 136 Ideo autem istis modis consensu dicimus obligationes contrahi, quia neque uerborum neque scripturae ulla proprietas desideratur, sed sufficit eos qui negotium gerunt consensisse: unde inter absentes quoque talia negotia contrahuntur, ueluti per epistulam aut per internuntium, cum alioquin uerborum  
 137 obligatio inter absentes fieri non possit.<sup>1</sup> Item in his con-

*gatio* is held to arise out of chirographa and syngraphae,—documents whereby a man either acknowledges himself indebted, or engages to give something without employing the formula of stipulation; this sort of obligation is peculiar to peregrins.

- 135 Obligations arise from consent in purchases and sales,  
 136 locations and conductions, partnerships, mandates. We say that in these forms obligations are contracted by consent, because no formality either of words or writing is required, it being enough that the parties to the business have arrived at a common understanding; accordingly such contracts may, through the intervention of a letter or a messenger, be entered into even between those who are not in each other's presence, which is impossible in the case of an obligation by spoken  
 137 words. Further, in the consensual contracts the parties are

*gatio*, as explained in tit. I. *afd.* The peculiarity of the *syngrapha*—which also contained an acknowledgment of debt and informal promise to pay—seems to have been either that it was executed in duplicate, and one of the documents retained by each of the parties, or that, after execution, like the more modern indenture or *charte-partie*, it was cut in two, and a part taken by each for preservation and as a precaution against fraud.

§§ 135-138. Comp. tit. I. *DE CONSENSV OBLIGATIONE* (iii, 22).

§ 135. Gai. in fr. 2, pr. D. *de O. et A.* (xlv, 7); pr. tit. I. *afd.*

§ 136. Gai. in fr. 1, 2, D. *de O. et A.* (xlv, 7); §§ 1, 2, tit. I. *afd.*

<sup>1</sup> Comp. § 12, I. *de inut. stip.* (iii, 19). The inconvenience resulting from the rule that there could be no stipulation *inter absentes* was obviated in this way: If a man had no slave of his own in or near the place where he desired to obtain a debtor's promise, he employed one resident there; that slave, pretending that for the time he was the property of and represented the absent creditor, acted as stipulant, and took a promise on his behalf; and a minute of the transaction, in which the absentee was described as owner of the stipulating slave, was usually written out and signed by the parties. This seems at least to be a legitimate inference from Justinian's words in

- tractibus alter alteri obligatur de eo quod alterum alteri ex bono et aequo praestare oportet, cum alioquin in uerborum obligationibus alius stipuletur, alius promittat,<sup>1</sup> et in nomini-  
 138 bus alius expensum ferendo obliget, alius obligetur.<sup>2</sup> Sed  
 absenti expensum ferri potest, etsi uerbis obligatio cum  
 absente contrahi non possit.<sup>1</sup>  
 139 (*Emptio et uenditio contrahitur*) cum de pretio conuenerit,  
 quamuis nondum pretium numeratum sit, ac ne arra quidem  
 data fuerit: nam quod arrae nomine datur argumentum est  
 140 emptionis et uenditionis contractae. Pretium autem certum  
 esse debet: nam alioquin si ita inter nos conuenerit ut quanti

- reciprocally liable for what each ought in fairness and equity to do for the other; whereas in verbal obligations, while one stipulates, only the other promises; and in *nomina*, while one, by making an entry to the other's debit, lays him under  
 138 obligation, it is only the latter that is obliged. But an  
 entry to a man's debit may be made in his absence, although a verbal contract with one who is not present is impossible.  
 139 Purchase and sale is contracted the moment parties have  
 agreed about the price, although it have not been paid, nor any earnest given; for what is given in name of earnest is only evidence that a purchase and sale has been contracted.  
 140 But the price must be definite: if the agreement between us be that a thing is bought for such a price as may be put upon

l. 14, pr. § 1, C. de contr. stip. (viii, 38).

Relying on the statement of Gai. i, § 54—that in iii, 166, is more to the point—that it was for his bonitarian and not his quiritarian owner that a slave acquired a claim by stipulation, Ubbelohde (*Z. f. RG.* xiii, pp. 488 f.) surmises that the practice must have been for the absentee to get a friend in the place of contract to take delivery of a slave on his account; that would place the slave *in bonis* of the absentee, and entitle him to act for the latter; after the stipulation he would be redelivered to his old owner, who had still retained the quiritarian right. This acquisition of the slave, however, as he thinks, must have become a mere form, and have often been neglected; otherwise Justinian would not have said in his preamble that stipulations had often been challenged on the ground that

the stipulating slave was not really the property of the party for whom the minute bore that he was acting. The emperor's declaration was that an averment of ownership in such a minute was not afterwards to be disputed, however false in point of fact.

§ 137. Gai. in fr. 3, D. de O. et A. (xliv, 7); § 3, tit. I. affd.

<sup>1</sup> Comp. § 92.

<sup>2</sup> Comp. §§ 129, 130.

§ 138. This par. seems to be a gloss, suggested, doubtless, by the reference to *nomina* in § 137. Most eds. introduce it after § 136; but even there it looks like an annotation.

<sup>1</sup> Comp. § 136; § 12, I. de inut. stip. (iii, 19).

§§ 139-141. Comp. tit. I. DE EMPTIONE ET VENDITIONE (iii, 23). These pars. are preceded by a rubric, probably *de emptione et uenditione*, of which only the first four letters are legible.

§ 140. Pr. tit. I. affd.

Titius rem aestimauerit tanti sit empta, Labeo<sup>1</sup> negauit ullam uim hoc negotium habere; cuius opinionem Cassius<sup>1</sup> probat: Ofilius<sup>2</sup> et eam emptionem et uenditionem [*esse putauit*];  
 141 cuius opinionem Proculus<sup>1</sup> secutus est. Item pretium in numerata pecunia consistere debet: nam in ceteris rebus an pretium esse possit, ueluti *homo*<sup>1</sup> aut toga aut fundus alterius rei [*pretium*],<sup>2</sup> ualde quaeritur. nostri praeceptores<sup>3</sup> putant etiam in alia re posse consistere pretium; unde illud est, quod uulgo putant, per permutationem rerum emptionem et *uenditionem* contrahi, eamque speciem emptionis uenditionisque uetustissimam esse; argumentoque utuntur Graeco poeta Homero, qui aliqua parte sic ait:

[ένθεν ἄρ' οἰνίζοντο καρηκομύωντες Ἀχαιοί,  
 [ἄλλοι μὲν χαλκῷ, ἄλλοι δ' αἰθωνι σιδήρῳ,  
 [ἄλλοι δὲ ῥινῶτι, ἄλλοι δ' αὐτῇσι βόεσσιν,  
 [ἄλλοι δ' ἀνδραπύδεσσιν.]<sup>4</sup>

diuersae scholae auctores<sup>3</sup> dissentiunt, aliudque esse existi-

it, say by Titius, then, according to Labeo, in whose opinion Cassius concurs, the transaction can have no effect, while Ofilius, and with him Proculus, holds that it amounts to purchase and sale. Further, the price must be fixed in current  
 141 money. Whether the price of a thing can consist of something else, such as a slave, a toga, or a bit of land, has, not without reason, been a matter of controversy. Our authorities think that it may; hence the common notion amongst them, that barter is just a contract of purchase and sale, and the very earliest form of it; for which, by way of argument, they quote the Greek poet Homer, who says somewhere: '*The long-haired Achaeans bought wine, some for brass, some for glistening steel, some for hides, some for cattle, some for slaves.*' The authorities of the other school do not take this view, but hold

<sup>1</sup> Comp. i, 196, note 1.

<sup>2</sup> Aulus Ofilius did not belong to either of the schools, but was a distinguished jurist in the time of Julius Caesar (fr. ii, § 44, D. *de orig. iuris*, i, 2), and supposed to have been his adviser and assistant in the digest of the law he did not live to complete (Suet. *Iul.* c. 44). Ofilius was also a teacher of repute, and had among his pupils both Capito and Labeo (fr. 2, § 47, D. as above). The text furnishes an instance of divergence of opinion between Labeo and Proculus, showing that it

was not an indiscriminate adherence that the latter accorded his master.

§ 141. Comp. § 2, tit. I. *af.*

<sup>1</sup> The ms. has *hoc modo*, which is corrected from the Inst.

<sup>2</sup> This word seems necessary to complete the sense. The Inst. have *pretium esse possit*, and so have most eds.; but the two latter words can be spared.

<sup>3</sup> See i, 196, note 1.

<sup>4</sup> Hom. *Il.* vii, 472-475. The quotation, as usual, is not in the ms., *et reliqua* being all that stands for it; it is supplied from the Inst.

mant permutationem rerum, aliud emptionem et uenditionem; alioquin (*non posse*)<sup>5</sup> rem expediri permutatis rebus, quae uideatur res uenisse, et quae pretii nomine data esse, sed rursus utramque rem uideri et uenisse et utramque pretii nomine datam esse absurdum uideri. sed ait Caelius Sabinus,<sup>6</sup> si rem tibi uenalem habenti, ueluti fundum, [acceperim, et]<sup>7</sup> pretii nomine hominem forte dederim, fundum quidem uideri uenisse, hominem autem pretii nomine datum esse, ut fundus acciperetur.

- 142 Locatio autem et conductio similibus regulis constituitur: nisi enim merces certa statuta sit, non uidetur locatio et  
143 conductio contrahi. unde si alieno arbitrio merces permissa sit, uelut quanti Titius aestimauerit, quaeritur an locatio et conductio contrahatur: qua de causa si fulloni polienda curandaue, sarcinatori sarcienda uestimenta dederim, nulla statim mercede constituta, postea tantum daturus quanti inter nos conuenerit, quaeritur an locatio et conductio con-

barter to be one thing, purchase and sale another and different one; otherwise it would be impossible to determine, as between two things given in exchange, which was the article sold, and which given in name of price; while to hold that each was at the same time both ware and price would be absurd. But, says Caelius Sabinus, if I come to you who have something for sale, say a plot of ground, and give you for it a slave in name of price, the ground will be considered sold, and the slave given as price, that so I may have the land.

- 142 Location and conduction are subject to much the same rules [as purchase and sale]; for unless a definite remuneration be agreed upon, location and conduction cannot be said to have  
143 been contracted. Hence, if the remuneration be left to the determination of a third party,—say ‘whatever sum Titius may fix,’—it is a question whether there be here a contract of location and conduction. And the same question arises when I give clothes to a fuller to be pressed or scoured, or to a tailor to be mended, no sum being fixed at the time as remuneration, but it being understood that, after the job is finished, I am to give so much as may then be agreed upon

<sup>5</sup> These two words, illegible in the ms., supplied from the Inst.

<sup>6</sup> See § 70, note.

<sup>7</sup> These two words, according to K. u. S., are a gloss.

§§ 142-147. Comp. tit. I. DE LOCATIONE ET CONDUCTIONE (iii, 23).

A vacant line precedes these pars. in the ms., probably for a rubric.

§ 142. Comp. Gai. in fr. 2, pr. D. loc. (xix, 2); pr. tit. I. afd.

§ 143. Comp. Gai. in fr. 25, pr. D. loc. (xix, 2); Gai. in fr. 22, D. de praescr. uerb. (xix, 5); § 1, tit. I. afd.



- 144 trahatur. *Item*<sup>1</sup> si rem tibi utendam dederim et inuicem  
 145 aliam rem utendam acceperim, quaeritur an locatio et con-  
 ductio contrahatur. Adeo autem emptio et uenditio et  
 locatio et conductio familiaritatem aliquam inter se habere  
 uidentur, ut in quibusdam causis quaeri soleat utrum emptio  
 et uenditio contrahatur an locatio et conductio: ueluti si qua  
 res in perpetuum locata sit, quod euenit in praediis municipum,  
 quae ea lege locantur ut quamdiu uectigal<sup>1</sup> praestetur neque  
 ipsi conductori neque heredi eius praedium auferatur; sed  
 146 magis placuit locationem conductionemque esse. *Item* si<sup>1</sup>  
 gladiatores ea lege tibi tradiderim ut in singulos qui integri  
 exierint pro sudore denarii xx mihi darentur, in eos uero  
 singulos qui occisi aut debilitati fuerint denarii mille, quae-  
 ritur utrum emptio et uenditio an locatio et conductio  
 contrahatur: et magis placuit eorum qui integri exierint  
 locationem et conductionem contractam uideri, at eorum qui  
 occisi aut debilitati sunt emptionem et uenditionem esse;

- 144 between us. It is also doubtful if there be location and  
 145 conduction when I have given you the use of a thing, receiv-  
 ing from you the use of something else in return. So much  
 do purchase and sale and location and conduction seem to  
 have in common, that in some cases there is room for question  
 whether it is the one or the other that has been contracted;  
 as, for example, when a thing is located in perpetuity, as  
 happens in the case of lands belonging to a municipality  
 granted by it in lease under a provision that, so long as the  
 rent charged upon them is duly paid, they shall not be with-  
 drawn either from the lessee or from his heir. The prevailing  
 opinion is that this is a contract of location and conduction.  
 146 Again, if I have furnished you with a band of gladiators, on  
 an agreement that for each of them that shall come scathless  
 out of the combat I am to have twenty *denarii* in payment  
 of his exertions, and a thousand for each that is killed or  
 disabled, it is disputed whether the contract be one of pur-  
 chase and sale or of location and conduction. It has been  
 held that as regards those who are unhurt it is one of location  
 and conduction, but one of purchase and sale as regards those  
 who have been killed or disabled. Therefore, what the con-

§ 144. Comp. § 2, tit. I. *af.*

<sup>1</sup> So P., K. u. S., and Hu.; the  
 ms. has *uel*.

§ 145. Comp. § 3, tit. I. *af.*

<sup>1</sup> Between *quamdiu* and *uctigal*

the ms. has *id*, for which Hu. substi-  
 tutes *inde*.

§ 146. <sup>1</sup> Before *si* the ms. has *quaeritur*;  
 obviously unnecessary.

- idque ex accidentibus apparet, tamquam sub condicione facta cuiusque uenditione an locatione:<sup>2</sup> (iam enim non dubitatur  
 147 quin sub condicione res ueniri aut locari possint.)<sup>3</sup> Item quaeritur, si cum aurifice mihi conuenerit ut is ex auro suo certi ponderis certaeque formae anulos mihi faceret, et acciperet uerbi gratia denarios cc, utrum emptio et uenditio an locatio et conductio contrahatur: Cassius<sup>1</sup> ait materiae quidem emptionem uenditionem contrahi, operarum autem locationem et conductionem; sed plerisque placuit emptionem et uenditionem contrahi. atqui si meum aurum ei dederò, mercede pro opera constituta, conuenit locationem conductionem contrahi.
- 148 Societatem coire solemus aut totorum bonorum aut unius alicuius negotii, ueluti mancipiorum emendorum aut uenden-  
 149 dorum. Magna autem quaestio fuit an ita coiri possit

- tract is will appear from the chapter of accidents, just as if there had been both a conditional sale and a conditional location of each individual gladiator; (for that things may be  
 147 sold and located under a condition is undoubted.) And again, if I have agreed with a goldsmith that he shall make me with his own gold some rings of a certain weight and pattern, and get say two hundred *denarii* for them, it is a point of controversy whether this be purchase and sale or location and conduction. Cassius thinks there is purchase and sale of the material, location and conduction of the labour expended upon it; but the general opinion is that the contract is one of purchase and sale. But if I provide the gold, agreeing to give the goldsmith so much for his labour, the contract is admittedly one of location and conduction.
- 148 We may enter into a partnership either as regards our whole means and estate, or as regards some particular business,  
 149 such as the buying and selling of slaves. It was once a

<sup>2</sup> The passage *idque . . . locatione* is not very intelligible. It would be better thus: *ideoque ex accidentibus apparet, tamquam sub condicione facta cuiusque et uenditione et locatione*, [*utrum emptio et uenditio contracta sit an locatio et conductio*]. Two conditional contracts were entered into as regards each of the gladiators, one of sale, the other of location; the event was to determine which became operative.

<sup>3</sup> Comp. Vlp. in fr. 20, pr. D. *loc.* (xix, 2).

§ 147. § 4, tit. I. afd. Comp. Gai. in fr. 2, § 1, D. *loc.* (xix, 2).

<sup>1</sup> See iii, 71, note.

§§ 148-154. A vacant line precedes. Comp. tit. I. *DE SOCIETATE* (iii, 25).

§ 148. Pr. tit. I. afd.

§ 149. Comp. § 2, tit. I. afd., from which G., followed by all eds., has supplied the words in italics.

- societas ut quis maiorem partem lucretur, minorem damni praestet: quod Quintus Mucius<sup>1</sup> [*contra naturam societatis [esse censuit; sed Servius Sulpicius,<sup>1</sup> cuius]* etiam praeualuit sententia, adeo ita coiri posse societatem existimavit, ut dixerit illo quoque modo coiri posse ut quis nihil omnino damni praestet sed lucri partem capiat, si modo opera eius tam pretiosa uideatur ut aequum sit eum cum hac pactione in societatem admitti: nam et ita posse coiri societatem constat ut unus pecuniam conferat, alter non conferat, et tamen lucrum inter eos commune sit; saepe enim opera ali-
- 150 cuius pro pecunia ualet. Et illud certum est, si de partibus lucri et damni nihil inter eos conuenerit, aequis ex partibus commodum et incommodum inter eos commune esse; sed si in altero partes expressae fuerint, uelut in lucro, in altero uero omissae, in eo quoque quod omissum est similes partes
- 151 erunt. Manet autem societas eo usque donec in eodem sensu perseuerant; at cum aliquis renuntiauerit societati,

- great question whether partnership could exist on the understanding that one of the parties was to have a larger share of the profit than he was to bear of the loss. Quintus Mucius held such an arrangement inconsistent with the nature of partnership; but Servius Sulpicius, whose opinion prevailed, saw nothing to prevent it, and went so far as to maintain that it might even be contracted on the footing that one of the partners should bear none of the loss at all, yet take a share of the profits, if only his services were esteemed so valuable as to render it fair that he should be admitted to the partnership on such terms. That there may be partnership where one of the partners contributes money capital, while the other does not, is allowed on all hands; for a man's
- 150 services are often as much worth as his money. It is clear that if nothing have been agreed between the partners as to their respective shares of profit and loss, they will equally benefit by the one and suffer from the other; but if the agreement be express as to one of the incidents of the contract, the share say of the profit which each is to take, and no mention be made of the loss, a corresponding share in it will be
- 151 held implied. A copartnery continues as long as the partners are of the same mind; if one of them renounce, it is dissolved.

<sup>1</sup> See i, 188, note 4.

§ 150. Comp. §§ 1, 3, tit. I. afd. Between *conuenerit* and *aequis* the ms.

interjects *tamen*; P. substitutes *totum*.

§ 151. § 4, tit. I. afd.

societas soluitur: sed plane si quis in hoc renunciaverit societati ut obueniens aliquod lucrum solus habeat, ueluti si mihi totorum bonorum socius, cum ab aliquo heres esset relictus, in hoc renuntiauerit societati ut hereditatem solus lucri faciat, cogetur hoc lucrum communicare; si quid uero aliud lucri fecerit quod non captauerit, ad ipsum solum pertinet: mihi uero quidquid omnino post renuntiatam  
 152 societatem acquiritur soli conceditur. Soluitur adhuc  
 153 societas etiam morte socii, quia qui societatem contrahit  
 certam personam sibi eligit. Dicitur etiam capitis deminutione solui societatem, quia ciuili ratione capitis deminutio  
 154 tatem noua uidetur incipere societas. Item si cuius ex  
 sociis bona publice aut priuatim uenierint, soluitur societas.  
 154a Sed *haec quoque* societas de qua *loquimur* — — consensu

But clearly if he have renounced in order to have all to himself some profit that is close at hand,—as when one who is my partner in a partnership of our whole means and effects, being left heir by some third party, renounces, on purpose that he may enjoy alone the whole gain of the succession,—he will be compelled to communicate a share. Any gains coming to him otherwise, however, and which he had not in view in renouncing, fall entirely to him; while, of course, whatever I acquire after the renunciation falls to me alone.  
 152 Partnership is also dissolved by death; for he who has contracted a partnership has chosen a particular person for his  
 153 partner. It is also held to be dissolved by *capitis deminutio*, which, according to the theory of our civil law, is equivalent to death; but if the partners consent to remain as before, a  
 154 new partnership is held to be thereby commenced. Further, if the estate of any one of the partners have been confiscated, or sold by his creditors on his bankruptcy, the partnership is  
 154a dissolved. But the partnership of which we are speaking

§ 152. § 5, tit. I. afd.

§ 153. Comp. fr. 4, § 1, fr. 58, § 2, fr. 63, § 10, fr. 65, § 11, D. *pro socio* (xvii, 2).

<sup>1</sup> Comp. iii, §§ 100, 101.

§ 154. Comp. §§ 7, 8, tit. I. afd.

§ 154a. The lacuna after *loquimur* represents four letters, of which the second seems to be *o*, and the fourth *q*; and instead of *iurisque gentium* the ms. has *iuris cogentium*. The par. is generally supposed to be

corrupt; but of the many attempts to reconstruct it none is quite satisfactory. It is possible that Gai. had in view the distinction alluded to by Pompon. in fr. 59, pr. D. *pro soc.* (xvii, 2), between *societates priuatae* and *societates uectigalium*, which latter were governed in some respects by rules of their own; and that he meant to limit his preceding observations to partnerships of the former class,—*societates uolun-*



contrahitur nudo *iurisque gentium est*; itaque inter omnes homines naturali ratione consistit.

- 155 *Mandatum* consistit siue nostra gratia mandemus siue aliena. itaque siue ut mea negotia geras, siue ut alterius, mandauerim, contrahitur mandati obligatio, et inuicem alter alteri tenebimur<sup>1</sup> in id quod uel *me tibi uel* te mihi bona fide praestare  
156 *oportet*.<sup>2</sup> nam si tua gratia tibi mandem superuacuum est mandatum; quod enim tu tua gratia facturus sis, id de tua sententia, non ex meo mandatu facere *debes*; itaque si otiosam *pecuniam* domi *te* habentem hortatus fuerim ut eam faenerares, *quamuis* eam ei mutuam dederis a quo seruare non potueris, non tamen habebis mecum *mandati* actionem: *item* si hortatus sim *ut rem* aliquam emeris, quamuis non expedierit tibi eam emisse, non tamen tibi mandati tenebor.<sup>1</sup> et adeo haec ita sunt ut quaeratur an mandati teneatur qui

*is that which* is contracted by bare consent, and which is *iuris gentium*; consequently its existence depends everywhere on considerations of natural law.

- 155 There is mandate whether the commission given by us be on our own account or on that of another person. Accordingly, whether I instruct you to transact some business for myself, or to do so for some other person, an obligation of mandate is contracted, and we are reciprocally responsible for  
156 what each ought in good faith to do for the other. A mandate to you to act on your own behalf is superfluous; if you do act for yourself, you ought to do so according to your own judgment, and not upon my instructions. Therefore if, knowing you to have money lying idle at home, I advise you to put it out at interest, and you lend it to a person from whom you are unable to recover it, you will have no action of mandate against me; neither will I be responsible if I have advised you to employ it in making a purchase which has turned out disadvantageous. It has even been questioned whether a man would be responsible to you in an action of

*tariae*, as Vlp. calls them in fr. 63, § 8, tit. D. *afd.* If so, all that is necessary is to fill the blank with the words *ea est quae (eaeq.)*. The force of the remark lies in the *naturali ratione*; if the *socii* persisted in consenting to be partners, their consent, which was the *naturalis ratio* of the contract, was not to be defeated by such *ciuiles rationes* as *cap. deminutio* or bankruptcy.

§§ 155-162. Comp. tit. I. *DE MANDATO* (iii, 26).

§ 155. Comp. Gai. in fr. 2, pr. D. *mand.* (xvii, 1); pr. tit. I. *afd.*

<sup>1</sup> Comp. Gai. in fr. 5, pr. D. *de O. et A.* (xliv, 7).

<sup>2</sup> The ms. has *oportere*.

§ 156. Comp. Gai. in fr. 2, pr. §§ 5, 6, D. *mand.* (xvii, 1); pr. §§ 5, 6, tit. I. *afd.*

<sup>1</sup> So G. and most eds.; the ms. has *teneri*; P. *teneri* [*potero*].

- mandavit tibi ut *Titio* pecuniam faenerares. Servius<sup>2</sup> negavit ; nec magis hoc *casu obligationem* consistere putavit quam si generaliter alicui mandetur uti pecuniam suam faeneraret : sequimur [*autem*] Sabini<sup>3</sup> opinionem *contra sentientis*,<sup>4</sup> quia non aliter Titio credidisses quam si tibi mandatum esset.
- 157 Illud *constat*, si quis de ea re mandet quae contra bonos mores est, non contrahi obligationem, veluti si tibi mandem ut Titio
- 158 furtum aut iniuriam facias. Item si quis post<sup>1</sup> mortem meam faciendum [*mihi*] mandet, inutile mandatum est, quia generaliter placuit ab heredis persona obligationem incipere
- 159 non posse. Sed recte quoque *contractum*<sup>1</sup> mandatum, si dum adhuc integra res sit reuocatum fuerit, evanescit.
- 160 Item si adhuc integro mandato mors alterutrius alicuius interueniat, id est vel eius qui mandauerit vel eius qui mandatum susceperit, soluitur mandatum ; sed utilitatis causa receptum est, ut si mortuo eo qui mihi mandauerit,

- mandate who commissioned you to lend your money say to Titius. Servius denied that he would, holding that in such a case the mandant was no more obliged than he who in general terms advised another to lend out his money at interest ; but we adopt the opinion of Sabinus, who took the opposite view, holding that here you would not have lent your money to
- 157 Titius but for the mandate you had received. There is no doubt of this, that if a man commission another to do something that is immoral, no obligation is contracted, as, for example, when I commission you to steal from Titius or
- 158 assault him. If a man give me a mandate to do something after my death, it is useless, according to the general rule that an obligation cannot commence in the person of an heir.
- 159 A mandate, however regularly granted, evanishes if revoked
- 160 before anything has been done in pursuance of it. It is dissolved likewise by the supervening death of either mandant or mandatory, no step having been taken towards its execution ; but, in order not to diminish the utility of such contracts, the law allows that, if after, but in ignorance of, the

<sup>2</sup> See i, 188, note 5.

<sup>3</sup> See i, 196, note 1.

<sup>4</sup> So all the later eds. ; the ms. and previous eds. have *consentientis*.

§ 157. § 7, tit. I. afd.

§ 158. Comp. § 100.

<sup>1</sup> After *post* K. u. S. interpolate *mortem suam vel post*.

§ 159. § 9, tit. I. afd.

<sup>1</sup> Instead of *contractum* (as in Inst.) the ms. has *consummatur*, usually rendered *consummatum*. But, as P. observes, this means 'carried out,' which is inconsistent with the idea of *res integra*.

§ 160. § 10, tit. I. afd.

ignorans eum decessisse executus fuero mandatum, posse me agere mandati actione; alioquin iusta et probabilis ignorantia damnum mihi adferret. et huic simile est quod plerisque placuit, si debitor meus manumisso dispensatori meo per ignorantiam soluerit, liberari eum, cum alioquin stricta iuris ratione non posset liberari eo quod alii soluisset quam cui  
 161 soluere deberet. Cum autem is cui recte mandauerim egressus fuerit mandatum, ego quidem eatenus cum eo habeo mandati actionem quatenus mea interest inplere eum mandatum, si modo implere potuerit; at ille mecum agere non potest. itaque si mandauerim tibi ut uerbi gratia fundum mihi sestertiis C emeris, tu sestertiis CL emeris, non habebis mecum mandati actionem, etiamsi tanti uelis mihi dare fundum quanti emendum tibi mandassem; idque maxime Sabino et Cassio<sup>1</sup> placuit: quodsi minoris emeris, habebis mecum scilicet actionem, quia qui mandat ut C milibus emeretur, is utique mandare intellegitur uti minoris si posset

death of my mandant, I have executed his commission, I may still have my action of mandate; otherwise my very excusable error might be to me a source of loss. On similar grounds most are of opinion that if my debtor pay to a former slave of mine who acted as my steward, in ignorance of the latter's manumission, he is discharged of liability; although, according to the strict rule of law, a man is not discharged by payment to another than the person to whom such payment  
 161 ought to have been made. If he to whom I have given a mandate in proper form exceed the limits of his commission, I may claim against him, in an *actio mandati*, damages for the loss I have sustained by his failure to fulfil his contract, provided fulfilment were possible; but he has no action against me. Accordingly, if I have commissioned you say to buy for me certain land for a hundred thousand sesterces, and you buy it for a hundred and fifty thousand, you will not have any action against me, even though you be willing to give me the ground at my own price,—such at least is the opinion of Sabinus and Cassius; but if you buy it for less money than I named, you will have action of mandate against me, seeing that one who authorises a purchase at the price of a hundred thousand, is held to authorise such purchase at a lower price

§ 161. Comp. Paul. in fr. 3, § 2, and Gai. fr. 4, D. *mand.* (xvii, 1); § 8, tit. I. *af.d.*

<sup>1</sup> See i, 196, note 1.

162 emeretur. In summa sciendum [*est, quotiens faciendum*] aliquid gratis dederim, quo nomine si mercedem statuisssem locatio et conductio contraheretur, mandati esse actionem, ueluti si fulloni polienda curandaue uestimenta [*dederim*] aut sarcinatori sarcienda.

163 Expositis generibus obligationum quae ex contractu nascuntur, admonendi sumus adquiri nobis non solum per nosmet ipsos, sed etiam per eas personas quae in nostra potestate manu  
164 mancipioe sunt. Per liberos quoque homines et alienos seruos quos bona fide possidemus acquiritur nobis; sed tantum ex duabus causis, id est si quid ex operis suis uel ex re nostra  
165 adquirant. Per eum quoque seruum in quo usumfructum habemus similiter ex duabus istis causis nobis acquiritur.  
166 Sed qui nudum ius Quiritium in seruo habet, licet dominus sit, minus tamen iuris in ea re<sup>1</sup> habere intellegitur quam usufructuarius et bonae fidei possessor: nam placet ex nulla

162 if possible. Finally, let it be understood that if I have given a thing to be done for me gratuitously, the giving of which, had it been to be done for reward, would have amounted to a contract of location and conduction, an action of mandate will lie; as when I have given clothes to a fuller to be pressed or scoured, or to a tailor to be repaired.

163 Now that the various sorts of obligations arising from contract have been explained, we must call attention to this,—that they may be acquired for us not only by our own instrumentality, but also by those who are in our *potestas, manus*, or  
164 *mancipium*. They are also acquired for us by freemen and by slaves belonging to other people whom we possess in good faith; but only in two cases, namely, when the acquisition is  
165 due either to their labour or to our funds. In the same two cases we acquire an obligation through a slave of whom we  
166 have the usufruct. But he who has only the bare quiritarian title to a slave is held to have even less right in this respect, though he be owner, than a usufructuary or a possessor in good faith; it is held that in no case can there be acquisition

§ 162. Comp. § 13, tit. I. afd. The words in ital. supplied by G.

§§ 163-167. Comp. tit. I. *PER QVAS PERSONAS NOBIS OBLIGATIO ADQVIRITVR* (iii, 28).

§ 163. Comp. ii, 86; pr. tit. I. afd.

§§ 164, 165. §§ 1, 2, tit. I. afd. Comp. ii, §§ 86, 91, 92.

§ 166. Comp. ii, 88.

<sup>1</sup> So the ms.; Hu. amends thus—*[adquisita ab] eo re.*



- causa<sup>2</sup> ei adquiri posse; adeo ut etsi nominatim ei dari stipulatus fuerit seruus, mancipioque nomine eius acceperit, quidam  
 167 existiment nihil ei adquiri. Communem servum pro dominica parte dominis adquirere certum est, excepto eo quod uni nominatim stipulando aut<sup>1</sup> mancipio accipiendo<sup>2</sup> illi soli adquirat, velut cum ita stipuletur: TITIO DOMINO MEO DARI SPONDES? aut cum ita mancipio accipiat: HANC REM EX IVRE QUIRITIVM L. TITHI DOMINI MEI ESSE AIO, EAQVE EI EMPTA  
 167a ESTO HOC AERE AENEAQVE LIBRA. Illud quaeritur [*an*] tamquam domini nomen adiectum domini efficit,<sup>1</sup> idem faciat unius ex dominis iussum intercedens. nostri praeceptores<sup>2</sup> perinde ei qui iusserit soli adquiri existimant, atque si nominatim ei soli stipulatus esset servus mancipioque accepisset; diversae scholae auctores<sup>2</sup> proinde utrisque adquiri putant, ac si nullius iussum interuenisset.

- for him [by direct operation of law]; and some go so far as to think that he acquires nothing even when a slave has stipulated expressly in his name, or has taken in his name a conveyance  
 167 by mancipation. There is no doubt that a slave owned in common acquires for his owners according to their respective proprietary interests in him, except when he expressly stipulates or takes by mancipatory conveyance in the name of one of them in particular; then he acquires for that one alone, as when he stipulates thus: 'Do you engage to give to my master Titius?' or when he takes a conveyance in these terms: 'I say that this thing belongs to my master Lucius Titius in quiritarian right, and be it his by purchase with  
 167a this bit of copper and these copper scales.' It is disputed whether or not the previous instructions of one in particular of the owners will make the acquisition his as effectually as the mention of his name. The leaders of our school think that he alone acquires who gave authority to the slave, just as if the slave had stipulated for or taken a conveyance to him *nominatim*; those of the other school maintain that in such a case all the owners share in the acquisition, as if there had been no instruction from any of them.

<sup>2</sup> The MS. adds *alia*, obviously *per incuriam*.

§ 167. Comp. § 3, tit. I. *afid.*; § 3, I. *de stip. serv.* (iii, 17).

<sup>1</sup> Before *aut* the MS. has *vel mancipando*, again an obvious mistake.

<sup>2</sup> Comp. i, 119.

§ 167a. Comp. ii, 87; § 3, tit. I *afid.*; § 3, I. *de stip. serv.* (iii, 17).

<sup>1</sup> This seems to me the reading of the MS. K. u. S., however, following G., have *quod domini nomen adiectum efficit*; Hu.—*quod nomen adiectum unius domini efficit*.

<sup>2</sup> Comp. i, 196, note 1.

- 168 Tollitur autem obligatio praecipue solutione eius quod debetur: unde quaeritur, si quis consentiente creditore aliud pro alio soluerit, utrum ipso iure liberetur, quod nostris praecceptoribus <sup>1</sup> placet, an ipso iure maneat obligatus, sed aduersus petentem exceptione doli mali defendi debeat, quod diuersae scholae auctoribus <sup>1</sup> uisum est.
- 169 *Item* per acceptilationem tollitur obligatio. acceptilatio autem est ueluti imaginaria solutio: quod enim ex uerborum obligatione tibi debeam, id si uelis mihi remittere poterit sic fieri, ut patiaris haec uerba me dicere: QVOD EGO TIBI PROMISI,
- 170 HABESNE ACCEPTVM? et tu respondeas: HABEO. Quo genere, ut diximus, [*tantum eae obligationes soluentur quae ex uerbis consistunt,*] non etiam ceterae; consentaneum enim uisum est uerbis factam obligationem posse aliis uerbis dissolui: sed et id quod ex alia causa debeatur potest in stipulationem deduci
- 171 et per acceptilationem [*dissolui.* *Quamuis uero dixerimus [perfici acceptilationem]* imaginaria solutione, tamen mulier

- 168 An obligation is extinguished first and foremost by payment of what is due. Hence it is a question whether a debtor who, with consent of his creditor, has paid something that is not due in place of that which is, is thereby freed by direct operation of law, as our authorities maintain, or is not still bound according to the letter of the law, as held by the authorities of the other school, and obliged to meet any action against him with an exception of dolo.
- 169 An obligation is also extinguished by acceptilation, which is as it were an imaginary payment. For if you wish to release me what I owe you on a verbal obligation, it may be done by your letting me say: 'That which I promised you have you received?' and by your answering: 'I have.'
- 170 By this process, as already said, *only obligations by verbal contract can be extinguished*, not other kinds; for it seems according to reason that an obligation contracted by spoken words should be dissoluble by other words. But what is due upon some other ground may be embodied in a stipulation and then
- 171 extinguished by acceptilation. *Although we have said that acceptilation is effected by imaginary payment, yet a woman*

§§ 168-181. Comp. tit. I. *QVIBVS MODIS OBLIGATIO TOLLITVR* (iii, 29).

§ 168. Comp. pr. tit. I. *afid.*

<sup>1</sup> Comp. i, 196, note 1.

§§ 169, 170. § 1, tit. I. *afid.*, from

which the words in ital. are borrowed.

§ 171. Comp. ii, 85. The words in ital. are supplied by Hu.; instead of *perfici*, K. u. S. suggest *contineri*.

- sine tutoris auctoritate acceptum facere non potest, cum alio-
- 172 quin solui ei sine tutoris auctoritate possit. Item quod debetur, pro parte *recte soluitur*; an autem in partem acceptum fieri possit *quaesitum* [est].
- 173 Est etiam alia species imaginariae solutionis per aes et libram; quod et ipsum genus certis in causis receptum est, ueluti si quid eo nomine debeatur quod per aes et libram
- 174 gestum sit, siue quid ex iudicati causa deb[etur]. *eaque* [res ita ag]itur: *adhibentur* non minus quam quinque testes et libripens; deinde is qui liberatur ita oportet loquatur: QVOD EGO TIBI TOT MILIBVS CONDEMNATVS (SVM), ME EO NOMINE A TE SOLVO LIBEROQVE HOC AERE AENEAQVE LIBRA: HANC TIBI LIBRAM PRIMAM POSTREMAMQVE EXPENDO [SECVNDVM] LEGEM PVBLICAM. deinde asse percutit libram, eumque *dat ei* a quo

- cannot acceptilate without her tutor's *auctoritas*, notwithstanding that without it payment may effectually be made to
- 172 her. Again, while a debt may quite well be paid in part, it is a question whether partial acceptance be competent.
- 173 Another sort of imaginary payment is that by the copper and the scales; a procedure employed only in certain cases, as when the debt has been formally created *per aes et libram*,
- 174 or is due upon a judgment. *It is gone about thus*: in the presence of at least five witnesses and a scale-bearer, he who is being freed from his obligation must speak as follows: 'Whereas I have been condemned to you in so many thousand sesterces, *in respect thereof I now release and free myself from you* with this copper and these copper scales; *I weigh out to you this the first and last pound, according to the statute.*' Then he strikes the scales with the *as*, and gives it

§ 172. Comp. § 1, tit. I. *afid.* The ms. has *quod debet pro parte debet recte solui recte soluit a. at in partem*, etc.

§ 173. Comp. Fest. v. *Nexum* (Bruns, p. 248); Varro de *L. L.* vii, § 105 (Bruns, p. 281).

§ 174. The words introduced in the beginning of the par. are the suggestion of K. u. S. The formula, which is not found elsewhere, is indistinct in the ms. It is thus deciphered by Stud.,—letters not absolutely certain being in italics, and those that are illegible represented by dots:—*negotibitotmilibcondemnat . . . megonmen.ctesoluo-lineroqh 'aereaeanaqlibrahancetibili-*

*bramprimamp'tremanqexpendelege-mpublicam.* The rendering adopted in the text is that of Karlowa (*R. CP.* p. 151); it is approved by K. u. S.; Goudsm. and Pol. read *recte* instead of *a te*; Hu. interpolates *dim* between *libra* and *hanc*. *Expendo* has its explanation in the account Gai. gives of the origin of the *negotium per aes et libram* in i, 174. The *secundum* in the end of the formula is introduced on the authority of Gai. ii, 104. On the *negotium per aes et libram* in other applications, see (in addition to the authorities referred to in last note) Gai. i, 119; ii, 104 (and note 8); iii, 89, note; iii, 167.

- 175 liberatur ueluti soluendi causa. Similiter legatarius heredem eodem modo liberat de legato quod per damnationem<sup>1</sup> relictum est, ut tamen *scilicet, sicuti* iudicatus *condemnatum* se esse significat, ita heres (*testamento*)<sup>2</sup> se dare *damnas*<sup>3</sup> esse dicat. de eo tamen tantum potest heres eo modo liberari quod pondere numero constet,<sup>4</sup> et ita si certum sit: quidam et de eo quod mensura constat *idem*<sup>5</sup> existimant.
- 176 Praeterea nouatione tollitur obligatio, ueluti si quod tu mihi debeas a Titio dari stipulatus sim; nam interuentu nouae personae noua nascitur obligatio et prima tollitur translata in posteriorem, adeo ut interdum, licet posterior stipulatio inutilis sit, tamen prima nouationis iure tollatur, ueluti si quod mihi debes a Titio post mortem eius, uel a muliere pupillouae sine tutoris auctoritate, stipulatus fuero; quo casu rem amitto, nam et prior debitor liberatur et posterior obli-

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to him from whom he is being released, as if in payment.

- 175 In the same way a legatee releases the heir from obligation for a legacy which has been bequeathed *per damnationem*; but, while the judgment debtor recites that he is *condemnatus*, the heir declares himself *testamento damnas* to pay the legacy. But an heir can be freed in this way only in respect of what can be weighed or counted, and is of definite amount; some include what may be measured.
- 176 Further, an obligation is extinguished by novation, as when I stipulate with Titius that he shall pay me what you owe me; for, by the intervention of a new party, a fresh obligation is created, and the original one is put an end to, being translated into the new. So far does this go, that sometimes the original obligation is extinguished on the principle of novation even though the new one be invalid, as when I stipulate that what you owe me shall be paid by Titius after his death, or by a woman or a pupil acting without tutorial *auctoritas*; in such a case I lose everything, for, while the original debtor is

§ 175. Comp. ii, 201.

<sup>1</sup> See ii, §§ 201 f.

<sup>2</sup> So Karlowa, followed by P., K. u. S., and Hu.

<sup>3</sup> The ms. has *damnat*, but Stud. does not think the last letter absolutely certain. The eds. all read *damnatum*; but as every formula had to adopt the words of the formal act to which it referred (iv, 23, Vlp. xxiv, 29, and note), and as *damnas*

*esto* was the phrase employed to impose the burden on the heir, *damnas sum* must have been recited by him in operating his discharge.

<sup>4</sup> Such things alone could be covered by the word *expendo*.

<sup>5</sup> So G. and all eds.; the ms. has *inde*.

§ 176. § 3, tit. I. afd. Comp. Gai. ii, 38; iii, §§ 100, 107, 108, 119; Fr. Vat. § 263.



gatio nulla est. non *idem* iuris est si a seruo stipulatus fuero; nam tunc [*prior*]<sup>1</sup> proinde adhuc obligatus tenetur, ac si postea  
 177 a nullo stipulatus fuisset. Sed si eadem persona sit a qua postea stipuler, ita demum novatio fit si quid in posteriore stipulatione noui sit, forte si condicio *uel dies uel sponsor*<sup>1</sup>  
 178 adiciatur aut detrahatur. Sed quod de sponsore diximus, non constat: nam diuersae scholae auctoribus<sup>1</sup> placuit nihil ad novationem proficere sponsoris adiectionem aut detrac-  
 179 tionem. Quod autem diximus si condicio adiciatur novationem fieri sic intellegi *oportet*, ut ita dicamus factam novationem si condicio extiterit; alioquin si defecerit durat prior obligatio: sed uideamus num is qui eo nomine agat doli mali aut pacti conuentioni exceptione possit summoueri, quia uidetur inter eos id actum, ut ita ea res peteretur si posterioris stipulationis extiterit condicio. Seruius tamen Sulpicius<sup>1</sup>

discharged, the second obligation is null. But the rule is different if my [novatory] stipulation be with a slave; in this case the original debtor still remains bound as fully as if there  
 177 had been no subsequent stipulation at all. A subsequent stipulation with the same person as the first will operate a novation then only when there is in it something new; for instance when a condition, or a specification of time, or a  
 178 sponsor, is either introduced or excluded. This, however, is not universally admitted so far as a sponsor is concerned; for the authorities of the other school hold that his introduction  
 179 or exclusion does not produce novation. In saying that there is novation when a condition is introduced, we are to be understood as meaning that there will be novation when the condition is fulfilled; if it fail, the original obligation still subsists. But it may be a question whether the creditor suing in such a case upon the original obligation may not be defeated by an exception of doli or of covenant, seeing that apparently it was the true intention of parties that action for the debt should be competent only on fulfilment of the condition annexed to the second stipulation. Servius Sulpicius

<sup>1</sup> Supplied from Inst.

§ 177. § 3, tit. I. afd.

<sup>1</sup> The MS. has—*condicio uel sponsor ā dies adiciatur*. P. regards the *ā dies* as a mistake of the transcriber, whose eye had carelessly caught the first few letters of *adiciatur*. But as the Inst. have *si con-*

*ditio aut dies aut fideiussor adiciatur*, it would seem that the *dies* has only been transposed.

§ 178. <sup>1</sup> See i, 196, note 1.

§ 179. Comp. Gai. fr. 30, §§ 1, 2, D. *de pact.* (ii, 14); § 3, tit. 1. afd.

<sup>1</sup> See i, 188, note 5.

existimauit statim et pendente condicione nouationem fieri, et si defecerit condicio ex neutra causa agi posse [*et*] eo modo rem perire; qui consequenter et illud respondit, si quis id quod sibi Lucius Titius deberet a seruo fuerit stipulatus, nouationem fieri et rem perire, quia cum seruo agi non potest: [*sed*] in utroque casu alio iure utimur: nec magis his casibus nouatio fit, quam si id quod tu mihi debeas a peregrino, cum quo sponsus<sup>2</sup> communio non est, SPONDES uerbo stipulatus sim.<sup>3</sup>

180 Tollitur adhuc obligatio litis contestatione,<sup>1</sup> si modo legitimo

held that there was novation at once, and while the condition was still open; and that on its failure neither obligation could be sued upon, so that the claim of the creditor was altogether extinguished. Upon the same principle he gave an opinion upon a case put to him, that, if a man stipulated with a slave for something due him, say by Lucius Titius, he operated a novation, and thereby extinguished the claim, action against the slave being impossible. But in both cases we follow a different rule; there is no novation in either of them, any more than when, using the formula *spondes*? I stipulate with a peregrin, whom the law does not hold qualified to act as sponsor.

180 Finally, an obligation is extinguished by litiscontestatio or

<sup>2</sup> So Bk., K. u. S., and Hu. The ms. has *sponsio*; G. *sponsionis*; Savigny and P. *sponsi*.

<sup>3</sup> Comp. §§ 93, 119, 176.

§§ 180, 181. Comp. § 10, I. *de except.* (iv, 13).

These two pars. deal with what has been called necessary or processual novation, in contradistinction to the voluntary or conventional novation described in those immediately preceding. And it amounted to this,—that in certain cases of action upon a debt the joinder of issue extinguished the original contention of the creditor that his debtor was bound to pay the debt, substituting for it this new one,—that the debtor ought to be condemned; consequently, if the action was for any reason not carried to a conclusion, the creditor could not *ipso iure* raise a new one, his original claim having ceased to exist.

Under the early system of procedure by *legis actio* (described by Gai. iv, §§ 11–29), if a man had once raised an action, no matter what the nature or form of it, but

failed to bring it to a conclusion, he had no power to begin anew; he had exhausted his remedy (iv, 108). But under the formular system (iv, §§ 30–52), in use in the classical period, this *ipso iure* exhaustion of his judicial remedy (*consumptio actionis*) on joinder of issue was limited to *iudicia legitima in personam*, with an *intentio in ius concepta* (iv, 107); if it was desired to put a stop to an action *in rem*, or to any other sort of *actio in personam*, upon the ground that the parties had previously joined issue on the same question, it was necessary to state an exception of *res in iudicium deducta*, the fresh action being *ipso iure* quite competent (iv, 106).

Gai., in §§ 180, 181, above, does not expressly affirm that the novation resulting from litiscontestatio was limited to actions *in personam* with an *intentio in ius concepta* (see iv, §§ 45–47); but the illustration in § 181 shows this to have been his meaning (Keller, *Litiscontestatio*, p. 85).

§ 180. <sup>1</sup> *Litiscontestatio* was marked in

iudicio<sup>2</sup> fuerit actum: nam tunc obligatio quidem principalis dissoluitur, incipit autem teneri reus litis contestatione; sed si condemnatus sit, sublata litis contestatione incipit ex causa iudicati teneri. et hoc [est] quod apud ueteres<sup>3</sup> scriptum est, ante litem contestatam dare debitorem oportere, post litem contestatam condemnari oportere, post condemnationem iudicatum facere oportere. Vnde fit, ut si legitimo iudicio debitum petiero, postea de eo ipso iure<sup>1</sup> agere non possim, quia inutiliter intendo DARI MIHI OPORTERE,<sup>2</sup> quia litis contestatione dari oportere desiit: aliter atque si imperio continenti iudicio<sup>3</sup> egerim; tunc enim nihilo minus obligatio durat, et ideo ipso iure postea agere possum, sed debeo per

joinder of issue, provided it be in a *legitimum iudicium*; for thereby the primary obligation is extinguished, and the defender begins to be bound by the litiscontestatio; and if he be condemned, the litiscontestatio falls aside, and he begins to be obliged by the judgment. Hence the saying of the old jurists that, before joinder of issue, the creditor's contention is that his debtor ought to pay; after joinder, that he ought to be condemned; after condemnation, that he ought to satisfy the judgment. Accordingly, if I have proceeded against my debtor in a *legitimum iudicium*, I cannot afterwards, as a matter of abstract right, sue him again for the same debt, because I can no longer validly maintain that he ought to pay, the 'ought to pay' having been put an end to by the litiscontestatio. It is different if I have been proceeding in a *iudicium imperio continens*; then the original obligation nevertheless continues; consequently I am by law entitled to raise a fresh action; but if I do, I must be defeated

the early procedure by the calling of witnesses to hear the magistrate settle the issue to be determined by the court or judge to whom it was remitted for trial; Paul. *ex Fest.* v. *Contestari* (Bruns, p. 239). In the classical procedure it was marked by the praetor's delivery to the pursuer of the written formula, which contained the issue.

<sup>2</sup> This phrase seems almost untranslatable. Neither 'statutable action' (Abdy and Walker), nor 'statutory action' (Poste), is an adequate rendering; for, as Gai. observes (iv, 109), an action might have been introduced by statute,

yet not be *legit. iud.*, while contrariwise it might be *legit. iud.* though introduced not by statute but by praetorian equity. See iv, §§ 103 f.

<sup>3</sup> See i, 144, note 2.

§ 181. <sup>1</sup> The words *ipso iure* are important; for there were cases in which fresh action might be allowed on grounds of equity by *restitutio in integrum* or otherwise; see fr. 25, fr. 46, § 5, D. *de admin. et peric. tut.* (xxvi, 7); l. 2, C. *de iudiciis* (iii, 1).

<sup>2</sup> Comp. iv, 41.

<sup>3</sup> Equally untranslatable with *legitimum iudicium*; see description in iv, 105.

*exceptionem* rei iudicatae uel in iudicium deductae summoueri.<sup>4</sup> quae autem legitima iudicia et quae imperio *continentia* sequenti commentario referemus.<sup>5</sup>

- 182 Transeamus nunc ad obligationes quae ex delicto *nascuntur*, ueluti si quis furtum fecerit, bona rapuerit, damnum dederit, iniuriam commiserit: quarum omnium rerum uno genere consistit obligatio,<sup>1</sup> cum ex contractu obligationes in IIII genera diducantur, sicut supra exposuimus.<sup>2</sup>
- 183 Furtorum autem genera Seruius Sulpicius<sup>1</sup> et Masurius Sabinus<sup>2</sup> IIII esse dixerunt, manifestum et nec manifestum, conceptum et oblatum: Labeo<sup>2</sup> duo, manifestum et nec manifestum; nam conceptum et oblatum species potius actionis esse furto cohaerentes quam genera furtorum; quod sane
- 184 uerius uidetur, sicut inferius apparebit. *Manifestum*<sup>1</sup> *furtum* quidam id esse dixerunt quod dum fit apprehenditur:

if an exception be pleaded of judgment recovered or of previous joinder of issue on the same question. What are *legitima iudicia* and what *iudicia imperio continentia* will be explained in our next Commentary.

- 182 Let us pass now to those obligations that originate in delict, as when theft has been committed, robbery, wrongful damage to property, or [personal] injury. The obligation in all of these is of the same sort; whereas, as we have seen, contractual obligations are of four sorts.
- 183 According to Servius Sulpicius and Masurius Sabinus, theft is of four varieties,—manifest and non-manifest theft, discovery of stolen goods, and introduction of them into the premises of a third party. But Labeo recognised only two varieties, the manifest and non-manifest; discovery of stolen goods, and introduction of them into the premises of a third party, he regards rather as grounds of action presupposing theft than varieties of it; and this seems the more correct
- 184 view, as will appear presently. A theft, according to some, is to be regarded as manifest then only when it is detected

<sup>4</sup> Comp. iv, 106.

<sup>5</sup> See iv, §§ 104, 105.

§§ 182-208. Comp. tit. I. *DE OBLIGATIONIBVS QVAE EX DELICTO NASCUNTVR* (iv, 1).

§ 182. Comp. Gai. in fr. 4, D. *de O. et A.* (xliv, 7); pr. tit. I. *afd.*

<sup>1</sup> All created *re*, that is by thing done.

<sup>2</sup> See § 89.

§ 183. Comp. Gai. in fr. 2, D. *de furt.* (xlvii, 2); Gell. xi, 18; Paul. ii, 31, § 2; § 3, tit. I. *afd.*

<sup>1</sup> See i, 188, note 5.

<sup>2</sup> See i, 196, note 1.

§§ 184, 185. Comp. Gell., Paul., Inst., as in last par.

<sup>1</sup> The Ms. has *metum fructum*.



alii uero ulterius, quod eo loco deprehenditur ubi fit, ueluti si in oliueto oliuarum, in uineto uuarum furtum factum est, quamdiu in eo oliueto aut uineto *fur sit*,<sup>2</sup> aut si in domo furtum factum sit, quamdiu in ea domo fur sit: alii adhuc ulterius, eousque — —<sup>3</sup> manifestum furtum esse dixerunt donec perferret eo quo perferre fur destinasset: alii adhuc ulterius, quandoque eam rem fur tenens uisus fuerit; quae sententia non optinuit: sed et illorum sententia qui existimauerunt, donec perferretur eo quo fur destinasset, deprehensum *furtum manifestum* esse, ideo non *uidetur* probari quod *magnam recipit* dubitationem *utrum unius diei an* etiam plurium dierum spatio id terminandum sit; quod eo pertinet, quia saepe in aliis ciuitatibus subreptas res in alias ciuitates uel in alias prouincias destinant fures perferre: ex duabus itaque superioribus opinionibus alterutra adprobatur; magis tamen  
 185 plerique posteriorem probant. *Nec* manifestum furtum quid sit ex iis quae diximus intellegitur: nam quod mani-  
 186 festum non est, id nec manifestum est. Conceptum furtum

while being committed; others extend the definition to theft detected while the thief is still in the place of its commission, —while he is still in the olive-garden, say, from which he has been stealing olives, or the vineyard in which he has been stealing grapes, or, if the theft have been committed in a house, before he has left it; others go further, and hold a theft to be manifest until the thief has reached his destination with the stolen property; while others go further still, and reckon the theft manifest if at any time the thief be discovered with the goods in his hands. This last opinion has not met with favour; nor does that which regards a theft as manifest until the thief has reached his destination seem to be approved, there being great dubiety as to the time, whether one day or several, within which that must occur,—for a thief often means to carry the things he has stolen in one city into another city or province. One or other of the first and second opinions, therefore, is adopted, and more generally the second.  
 185 What is non-manifest theft may be gathered from what has been already said; whatever is not manifest is non-manifest.  
 186 There is said to be *furtum conceptum* when stolen goods are sought for and discovered on a man's premises in the presence

<sup>2</sup> The ms. has *fuerit*.

<sup>3</sup> P. conjectures that the illegible word may have been *scilicet*; Hu.

inserts *cuiusque rei*.

§ 186. § 4, tit. I. afd. Comp. §§ 191, 192; Paul. ii, 31, §§ 3, 5.

- dicitur cum apud aliquem testibus praesentibus furtiva res quaesita et inuenta est: nam in eum propria actio constituta  
 187 est, quamvis fur non sit, quae appellatur concepti. Oblatum furtum dicitur cum res furtiva tibi ab aliquo oblata sit, eaque apud te concepta sit; *utique*<sup>1</sup> si ea mente data tibi fuerit ut apud te potius quam apud eum qui dederit conciperetur: nam tibi, apud quem concepta est, propria aduersus eum qui optulit, quamvis fur non sit, constituta est actio [*quae*]  
 188 appellatur oblati. Est etiam prohibiti furti [*actio*] aduersus eum qui furtum quaerere uolentem prohibuerit.
- 189 Poena manifesti furti ex lege XII tabularum capitalis<sup>1</sup> erat: nam liber uerberatus addicebatur ei cui furtum fecerat; utrum autem seruus efficeretur ex additione an adiudicati loco constitueretur ueteres quaerebant:<sup>2</sup> — — — — —.<sup>3</sup> *sed* postea

- of witnesses; it gives rise to a special action against him, even though he be not the thief, which goes by the name of  
 187 *actio furti concepti*. *Furtum oblatum* occurs when stolen property has been brought to you by some one and discovered on your premises, at least if it have been given to you with the intent that it should be found in your house rather than his; you, on whose premises the discovery has been made, are entitled to an action against the individual who introduced the stolen goods, even though he be not the thief, which  
 188 is called an *actio furti oblati*. The *actio furti prohibiti* is that made use of against a man who prevents search being made [on his premises] for stolen property.
- 189 The punishment of manifest theft, according to the Twelve

§ 187. § 4, tit. I. afd. Comp. § 191; Paul. ii, 31, §§ 3, 5.

<sup>1</sup> The ms. has *uelutique*.

§ 188. § 4, tit. I. afd. Comp. § 192.

§§ 189, 190. Comp. Cic. *pro Tullio*, v, 47; Gell. xi, 18, xx, 1; Serv. *ad Aen.* viii, 205; Macrob. *Sat.* i, 4, § 19; § 5, tit. I. afd.

<sup>1</sup> A capital punishment was one that affected the *caput* of the individual by depriving him of life, liberty, or citizenship.

<sup>2</sup> Gai. seems to be pointing to the distinction between an individual who by judicial sentence became in the fullest sense the slave of the party to whom he was awarded, and an *adiudicatus*, i.e. an insolvent debtor handed over to his creditor to work off his debt,

and who was only *de facto* in the position of a slave, *de iure* a free-man. That the convicted manifest thief could not have been in the position of a mere *adiudicatus* (who forfeited neither freedom nor citizenship) seems clear; if he had been, his punishment could not have been described as capital. Gell. (xi, 18, § 8) says that if the theft was by night, or the thief armed, the punishment was death; but that, in the absence of either of those aggravations, *decemui* . . . *liberos uerberari addicique iusserunt ei*, etc. This may be ambiguous; but in xx, i, § 7, he says distinctly—*furem manifestum ei cui furtum factum est in seruitutem tradit*.

<sup>3</sup> The illegible passage (two-thirds

inprobata est asperitas poenae, et tam ex serui persona quam  
 190 ex liberi quadrupli actio praetoris edicto constituta est. Nec  
 manifesti furti poena per legem [XII] tabularum dupli inro-  
 191 gatur, eamque etiam praetor conseruat. Concepti et oblati  
 poena ex lege XII tabularum tripli est, *eaque* similiter a prae-  
 192 tore seruatur. Prohibiti actio quadrupli est, ex edicto  
 praetoris introducta: lex autem eo nomine nullam poenam  
 constituit; hoc solum praecipit, ut qui quaerere uelit nudus  
 quaerat, linteo<sup>1</sup> cinctus, lancem habens; qui si quid inuenerit,<sup>2</sup>

Tables, was capital. If the thief was a freeman, he was scourged and given up by magisterial decree to him whose goods he had stolen; but whether this addiction made him a slave, or only put him in the condition of an insolvent judgment debtor, was a point of controversy with the old lawyers. [*If a slave, he was first scourged and then thrown from the [Tarpeian rock.]* But afterwards these punishments were disapproved on account of their severity; and an action for fourfold the value of the thing stolen, applicable alike to free-men and slaves, was substituted by the praetorian edict.

- 190 Non-manifest theft was punished by the Twelve Tables with  
 x a twofold ~~restitution~~; and this the praetor has left untouched.  
 191 The punishment for stolen goods discovered or introduced, according to the Tables, was of threefold the value of the stolen property; and this too the praetor has retained.  
 192 The *actio furti prohibiti* for fourfold the value was introduced by the edict. The Twelve Tables had not provided any punishment for this offence; all they required was that he who proposed to search another's premises for stolen pro-

of a line) was thus supplied by Hu. in his third edition—in *seruum aequē uerberatum animaduertebatur*, and this conjecture has been adopted by K. u. S. Hu. in his last edition, however, proposes—in *eum autem, qui [seruus erat aequē] uerberatum animaduertebatur*. Neither reading is satisfactory; and we can hardly suppose that Gai. would content himself with so feeble a word as *animaduertere*, when he was in the same breath denouncing the *asperitas poenae*. Gell. (§ 8) says—*iusserunt . . . seruos . . . uerberibus adfici et e saxo praecipitari*. Hence Schoell (*Leg. XII Tab. rel. p. 146*) suggests—*seruus aequē uerberatus e saxo deiciebatur*.

§ 191. Comp. iv, 173; Gell. xi, 18; Paul. ii, 31, § 14; § 4, tit. I. afd.

§ 192. Comp. Plato *de leg.* xii, 7; Schol. Aristoph. *Nub.* 499; Paul. *ex Festo*, v. *Lance et licio* (Bruns, p. 244); Gell. xi, 18, xvi, 10 (where he says that the practice of search *lance et licio* was abolished by the *lex Aebutia*, as to which see below, iv, 30, note 1); *Lex Burgund.* tit. 12; § 4, tit. I. afd.; Inst. Gloss. Taurin. iv, 1, § 4 (*Z.f. RG.* vii, 78).

<sup>1</sup> So the ms.; many editors, following Gellius, etc., substitute *licio*; Hu., both here and in subsequent pars., retains the *linteo* and adds *licio*.

<sup>2</sup> So those four words in the ms. But there is good reason to doubt

+ penalty.

193 iubet id lex furtum manifestum esse. Quid sit autem linteum quaesitum est: sed uerius *est cum* consuti genus esse, quo necessariae partes tegerentur. *quae res tota*<sup>1</sup> ridicula est; nam qui uestitum quaerere prohibet, is et nudum quaerere prohibiturus est, eo magis quod ita quaesita re inuenta maiori poenae subiciatur. deinde quod lancem siue ideo haberi iubeatur ut manibus *occupatis*<sup>2</sup> nihil subiciat, siue ideo ut

193 perty should do so naked, wearing nothing but a *lintheum* and carrying a platter; and if he found anything, then, according to the Tables, the case was to be dealt with as one of manifest theft. What this *lintheum* has been doubted, but it seems to have been some sort of cloth or towel worn round the loins for decency's sake. But the whole thing is ridiculous; for he who would prevent a man wearing his ordinary dress from making a search, would equally prevent him when naked, especially as the discovery of a thing when sought for would subject the prohibiter to a heavier penalty. And as regards the platter, whether it be said that its use was enjoined in order that, the hands of

their accuracy, and to warrant the surmise that Gai. had formed an erroneous notion of the distinction between *furtum conceptum* and *furtum prohibitum*. That he was puzzled is evident from what he says in the next par. The view that occurs to me, and that seems to obviate the difficulty he there expresses, is this: that in the earlier law search required in every case to be made *lance et licio*, and at a later period (§ 186; § 4, tit. I. afd.) in the presence of witnesses; that if the search was permitted, and the stolen property discovered, there was *furtum conceptum* with a threefold penalty; but that if it were prevented there was under the Twelve Tables a constructive *furtum manifestum*, and under the edict an offence called *furtum prohibitum*, punished with the same fourfold penalty as manifest theft.

If this be the correct view, *quod si prohibitus fuerit* ought to be substituted for *qui si quid inuenerit*; for the *actio furti prohibiti* appears to have been based, not on the discovery of the stolen goods in spite

of prohibition,—indeed it is extremely doubtful whether under such circumstances search was possible, for to enter a man's house against his will was an offence (Gai. in fr. 18, D. *de in ius uoc.* ii, 4),—but on the prohibition itself (§ 188). If there had been an *actio furti prohibiti* only when the stolen property had been discovered, what shadow of reason could there have been for the contention of some of the jurists (§ 194) that *furtum prohibitum* was theft only by fiction of law, *lege, non natura*?

§ 193. See references and remarks in notes to last par.

<sup>1</sup> The ms. has *grlex tota*; but the *lex* seems to be a gloss,—some annotator's explanation of what he understood by the *res*. Hu. reads *quare lex tota*.

<sup>2</sup> The ms. has *occupantis*; the correction is Vangerow's in his dissertation *de furto concepto ex lege XII Tab.* (Heidelb. 1845),—a monograph very amusing in its exposure of the vagaries of the civilians on this subject, but which itself rests content with the explanation of Gai. as in all respects satisfactory.



- quod inuenerit ibi inponat, neutrum eorum procedit si id quod quaeratur eius magnitudinis aut naturae sit ut neque subici neque ibi inponi possit. certe non dubitatur cuius-
- 194 cumque materiae sit ea lanx satis legi fieri. Propter hoc tamen quod lex ex ea causa manifestum furtum esse iubet, sunt qui scribunt furtum manifestum aut lege [*intellegi*]<sup>1</sup> aut natura; lege id ipsum de quo loquimur, natura illud de quo superius exposuimus: sed uerius est natura tantum manifestum furtum intellegi; neque enim lex facere potest ut qui manifestus fur non sit, manifestus sit, non magis quam qui omnino fur non sit, fur sit, et qui adulter aut homicida non sit, adulter uel homicida sit; at illud sane lex facere potest, ut proinde aliquis poena teneatur atque si furtum uel adulterium uel homicidium admisisset, quamuis nihil eorum admiserit.
- 195 Furtum autem fit non solum cum quis intercipiendi causa rem alienam amouet, sed generaliter cum quis rem alienam

- the holder being occupied in carrying it, he could not surreptitiously take anything into the premises, or in order that he might place upon it anything found by him, neither reason could be satisfactory when the article sought for was of such a size or nature that it could neither be smuggled into the premises nor put upon the platter. There is no doubt that the law was complied with if a platter was there, no matter of
- 194 what material it might be. On the strength of the declaration of the Tables that the discovery of stolen articles in this way is to be treated as manifest theft, some maintain that a theft may be manifest either by force of law or in point of fact; by force of law in the case we have just been dealing with, in point of fact in that previously explained. But it is more accurate to say that theft can be manifest only when it is so in point of fact; the law can no more make a man a thief who is not so, than it can make that person an adulterer or a homicide who is innocent of adultery or manslaughter; but it may do this,—it may declare a man liable to punishment as if he had committed theft, adultery, or manslaughter, although he be not actually guilty of any of them.
- 195 There is theft not only when a man removes another's property with the intention to deprive him of it, but generally when one meddles with what belongs to another against the

§ 194. Comp. Gai. in fr. 2, § 1, D. *de usufr. eur. rer.* (vii, 5).

<sup>1</sup> Huschke's addition.  
§ 195. § 6, tit. I. afl. Cp. Paul. ii, 31, § 1.

- 196 inuito domino contrectat. Itaque si quis re quae apud eum deposita sit utatur, furtum committit; et si quis utendam rem acceperit, eamque in alium usum transtulerit, furti obligatur, ueluti si quis argentum utendum acceperit, [*quod*]<sup>1</sup> quasi amicos ad *cenam inuitaturus* rogauerit,<sup>2</sup> et id peregre secum tulerit, aut si quis equum gestandi gratia commodatum longius *secum*<sup>3</sup> aliquo duxerit, quod ueteres scripserunt de eo
- 197 qui in aciem<sup>4</sup> perduxisset. Placuit tamen eos qui rebus commodatis aliter uterentur quam utendas accepissent ita furtum committere, si intellegant id se inuito domino facere, eumque si intellexisset non permissurum; at si permissurum credant, extra furti crimen uideri: optima sane distinctione,
- 198 quia furtum sine dolo malo non committitur.<sup>1</sup> Sed et si

- 196 owner's will. Accordingly, if a man take the use of a thing deposited with him, he commits a theft. So does he who, having received a thing to be used in a particular way, takes the use of it in another way; as, for instance, when a man on his own request, and on the representation that he is about to entertain his friends, has received the use of certain silver plate, which he carries away with him into the country; or when one takes with him to a distance—to use an illustration of the old jurists, when he takes into battle—a horse bor-
- 197 rowed by him merely for a ride. But the statement that a borrower commits theft by using what he has borrowed for another purpose than that for which it was lent, must be taken with this qualification,—if he know that the owner does not consent, and that the latter, if he were aware of what was being done, would not allow it. If the borrower believe that it would be allowed, the idea of theft is excluded; and the distinction is a very proper one, seeing that there can
- 198 be no theft without wrongful intent. Even when a man

§ 196. § 6, tit. I. afd. Comp. Gell. vi, 15; Valer. Max. viii, 2, § 4; Paul. ii, 31, § 29.

<sup>1</sup> Inserted by all eds. except Hu., P., and K. u. S., who drop the subsequent *rogauerit*, and so find *quod* unnecessary.

<sup>2</sup> This word in the ms., but deleted by the eds. just mentioned.

<sup>3</sup> The ms. has *longius cum aliquo*; *secum* is Goeschen's amendment, approved by most eds.; K. u. S. drop the word altogether; Hu. re-

forms the sentence,—*longius [quam quo rogauerit] aliquo*, etc.

<sup>4</sup> The ms. has *in aciem* quite distinctly; but Hu. in his last edition has substituted *uls Ariciam*, under the belief that the reference is to the story told by Valer. Max. of a man who was condemned for theft because, having borrowed a horse to ride to Aricia, he took it a little further.

§ 197. § 7, tit. I. afd.

<sup>1</sup> Comp. ii, 50; Paul. ii, 31, § 1.

§ 198. § 8, tit. I. afd.

- credat aliquis inuito domino se rem contrectare, domino autem uolente id fiat, dicitur furtum non fieri. unde,<sup>1</sup> cum Titius seruum meum *solicitaue*rit<sup>2</sup> ut quasdam res mihi subriperet et ad eum perferret, [*et seruus*]<sup>3</sup> id ad me pertulerit, ego, dum uolo Titium in ipso delicto deprehendere, *permiserim* seruo quasdam res ad eum perferre, quaesitum est utrum furti an serui corrupti iudicio<sup>4</sup> teneatur Titius mihi, an neutro? responsum neutro eum teneri; furti ideo quod non inuito me res contrectauerit, serui corrupti ideo quod deterior seruus
- 199 factus non sit. Interdum autem etiam liberorum hominum furtum fit, ueluti si quis liberorum nostrorum qui in potestate nostra sunt, siue etiam uxor quae in manu nostra sit,<sup>1</sup> siue etiam adiudicatus<sup>2</sup> uel auctoratus<sup>3</sup> meus subreptus *fu*erit.
- 200 Aliquando etiam suae rei quisque furtum committit, ueluti si debitor rem quam creditori pignori dedit subtraxerit, uel si

believes that he is dealing with a thing against the will of its owner, yet if in fact the owner consents, it is held that no theft is committed. Hence, when Titius was importuning a slave of mine to carry away things belonging to me and give them to him, (of which my slave informed me,) and I, desiring that Titius should be taken in the act, allowed my slave to take some articles to him, this question arose,—Was Titius liable to me in an action for theft, or in an action for corrupting my slave? or was he liable in neither? The answer was that he was liable in neither; that he was not liable for theft, because there had been no meddling with my property against my will, nor for corrupting my slave, because the latter was not a whit the worse for what had happened.

- 199 Sometimes there may be theft even of free persons; as when any of my children in my *potestas* is stealthily carried off, or my wife *in manu*, or even my judgment debtor, or one of my
- 200 sworn gladiators. Sometimes, too, a man may steal what is his own, as when a debtor surreptitiously takes away some-

<sup>1</sup> After *unde* the ms. has *illud quaesitum et probatum est*, which have been expunged as a gloss.

<sup>2</sup> So the Inst.; the ms. has *colligitar*.

<sup>3</sup> Supplied from the Inst.

<sup>4</sup> Comp. § 23, I. *de act.* (iv, 6).

§ 199. Comp. § 9, tit. I. *afid.*

<sup>1</sup> Comp. ii, 90 (*ipsas non possidemus*).

<sup>2</sup> See § 189, note 2; iv, 21, note 6. The ms. and most eds. have

*iudicatus*; the amendment is due to Hu., who rightly observes that the *iudicatus* or judgment debtor was not in any sense in the possession of his creditor until *adiudicatio*,—a step in execution rendered necessary by his having no effects.

<sup>3</sup> See *Collat.* iv, 3, § 2, ix, 2, § 2; *L. Iulia Municipalis*, cap. 25 (Bruns, p. 79).

§ 200. Comp. § 204; Paul. ii, 31, §§ 21, 36; § 10, tit. I. *afid.*

bonae fidei possessori rem meam possidenti subriperim: unde placuit eum qui seruum suum, quem alius bona fide possidebat, ad se reuersum celauerit, furtum committere. Rursus ex diuerso interdum alienas res occupare et usucapere concessum est, nec creditur furtum fieri, ueluti res hereditarias quarum heres *non est* nactus possessionem, nisi necessarius heres *esset*;<sup>1</sup> nam necessario herede extante placuit nihil pro herede usucapi posse. *Item debitor rem* quam fiducia causa creditori mancipauerit aut in iure cesserit, *secundum* ea<sup>2</sup> quae in superiore commentario rettulimus, sine furto possidere et usucapere potest. Interdum furti tenetur *qui* ipse furtum non fecerit, qualis est cuius ope consilio furtum factum est: in quo numero est qui nummos tibi excussit ut eos alius subriperet, uel obstitit tibi ut alius subriperet, aut oues aut boues tuas fugauit ut alius eas exciperet: et hoc ueteres<sup>1</sup> scripserunt

thing he has given to his creditor as a pledge, or when I stealthily take away something of mine from a party possessing it in good faith; and accordingly it has been ruled that he who conceals his own slave, who has run away from a third party possessing him in good faith, is guilty of theft. On the other hand we are sometimes allowed to possess ourselves of another's property, and acquire a title to it by usucapion, without any theft being held to have been committed; as [when we take possession of] things belonging to an inheritance before the heir has entered, provided always he is not a necessary heir; for it is held that if there be a necessary heir there can be no usucapion *pro herede*. A debtor, also, may, without any imputation of theft, possess and reacquire by usucapion a thing he has fiduciarily conveyed to his creditor by mancipation or cession before a magistrate, as explained in the preceding Commentary. Occasionally a man may be chargeable with theft although he may not have been the actual thief, namely, when it has been committed with his aid or counsel. He belongs to this class who has knocked money out of your hand that another might make off with it, or has impeded your movements that another might take something from you, or has scattered your sheep or cattle—as, in an old case in the books, by the use of a red flag—that another might get them away from you. But if any of such things have been done in

§ 201. Comp. ii, §§ 52, 56–60; Paul. ii, 31, § 11.

<sup>1</sup> So the ms.; K. u. S. and Hu. have *extet*; I fail to see why.

<sup>2</sup> The ms. has *dum ea*.

§ 202. § 11, tit. I. afd. Comp. iv, 37; Paul. ii, 31, § 10; §§ 12, 13, tit. I. afd.

<sup>1</sup> See i, 144, note 2.



de eo qui panno rubro fugauit armentum. sed si quid per lasciuiam et non data opera ut furtum committeretur factum sit, uidebimus an utilis<sup>2</sup> *actio dari*<sup>3</sup> debeat, cum per legem Aquilianam<sup>4</sup> quae de damno lata [*est*] etiam culpa puniatur.

- 203 Furti autem actio ei competit cuius interest rem saluam esse, licet dominus non sit: itaque nec domino aliter competit quam  
204 si eius intersit rem non perire. Vnde constat creditorem de pignore subrepto furti agere posse; adeo quidem ut quamuis ipse dominus, id est ipse debitor, eam rem subripuerit, nihilo  
205 minus creditori competat actio furti. Item si fullo polienda curandaue aut sarcinator sarcienda uestimenta mercede certa acceperit, eaque furto amiserit, ipse furti habet actionem, non dominus; quia domini nihil *interest*<sup>1</sup> ea non periisse, cum iudicio locati a fullone aut sarcinatore suum *consequi* possit, si modo is fullo aut sarcinator *rei praestandae*<sup>2</sup> sufficiat; nam si soluendo non est, tunc quia ab eo dominus suum consequi non

pure wantonness, and not of set purpose to facilitate a theft, it will be for consideration whether an *utilis* [Aquilian] *actio* ought not to be allowed, since, by the Aquilian law concerning wrongful damage to property, even *culpa* is punishable.

- 203 The *actio furti* is competent to him whose interest it is that the thing should be safe, even though not its owner; therefore the owner can raise it then only when it is his interest  
204 that the thing should not be lost. Hence it is acknowledged that a creditor may raise it in respect of theft of what has been pledged to him, and that even when it is the owner,  
205 that is to say his debtor, that has taken it from him. So, if clothes have been given to a fuller to be pressed or scoured, or to a tailor to be repaired, and that for a fixed recompense, if he has lost them by theft it is he that has the *actio furti*, and not the owner; for it matters not to the latter whether they be lost or not, seeing he can recover damages from the fuller or tailor, if he be solvent, by an action of location. If, however, he be insolvent, then, as the owner cannot recover

<sup>2</sup> See ii, 78, note 1.

<sup>3</sup> The ms. has *atque dari*; the Inst. *actio dari*; but for *atque* one might perhaps read *Aquiliana*.

<sup>4</sup> Comp. § 211.

§ 203. § 13, tit. I. afd. Comp. Paul. ii, 31, § 4. On the *condictio furtiua* see iv, 4.

§ 204. Comp. Paul. ii, 31, § 19; § 14, tit. I. afd.

§ 205. Comp. Paul. ii, 31, § 29; § 15. tit. I. afd; § 5, I. *de locat. et cond.* (iii, 24).

<sup>1</sup> So the Inst.; the ms. has *id est*.

<sup>2</sup> The ms. has *rempstandepic*; P. reads *representandae pecuniae*; Hu. *rei praestandae plene*; K. u. S. as above.

- potest, ipsi furti actio competit, quia hoc casu ipsius interest  
 206 rem saluam esse. *Quae de*<sup>1</sup> fullone aut sarcinatore diximus,  
 eadem transferemus et ad eum cui rem commodauimus: nam  
 ut illi mercedem capiendo custodiam praestant, ita hic quoque  
 utendi commodum percipiendo similiter necesse habet cus-  
 207 todiam praestare. Sed is apud quem res deposita est custo-  
 diam non praestat, tantumque in eo obnoxius est si quid ipse  
 dolo [*malo*]<sup>1</sup> fecerit; qua de *causa* [*si*] *res*<sup>2</sup> ei subrepta fuerit  
 quae restituenda est,<sup>3</sup> eius nomine actione depositi non tenetur,  
 nec ob id eius interest rem saluam esse; furti itaque agere non  
 potest, sed ea actio domino competit.
- 208 In summa sciendum est quaesitum esse an inpubes rem  
*alienam amouendo* furtum faciat. plerisque placet, quia  
 furtum ex *adfectu* consistit,<sup>1</sup> ita demum obligari eo crimine

- from him what he is entitled to, he, the owner, may sue the  
*actio furti*, because in this case he has an interest in the  
 206 safety of his property. What has been said of a fuller  
 or tailor applies equally to him to whom we have lent some  
 specific article; for as the former, in consideration of the pay-  
 ment they are to receive, are responsible for the safe custody  
 of the thing entrusted to them, so of necessity is the latter,  
 for the simple reason that he is enjoying the advantage of  
 207 using it. A depositary, however, is not responsible for the  
 safe-keeping of what has been deposited with him, being liable  
 only in so far as he himself has done something doleful; con-  
 sequently if it be taken from him surreptitiously, as he cannot  
 on that account be convened in an action of deposit, and has  
 really no interest in the safety of the thing, it is not he but  
 the owner that is entitled to the *actio furti*.
- 208 Finally, it is a question whether a child below the age of  
 puberty commits theft by taking away what belongs to  
 another. Most agree that, as theft depends upon intent,  
 such a child can only oblige himself in respect of it when he

§ 206. § 16, tit. I. afd. Comp. Collat.  
 x, 2, §§ 1, 6; § 2, I. *quib. mod. re*  
*contr. obl.* (iii, 14).

<sup>1</sup> The ms. has *deque*.

§ 207. § 17, tit. I. afd. Comp. § 3,  
 I. *quib. mod. re contr. obl.* (iii,  
 14).

<sup>1</sup> *Malo* from Inst., omitted in  
 the ms.

<sup>2</sup> For *qua de causa* [*si*] *res*, the  
 ms. has *quadegreis*.

<sup>3</sup> So the ms., quite distinctly and  
 intelligibly. Hu. and K. u. S., pre-  
 ferring apparently the version of  
 the Inst., read *quia restituendae*  
*eius*, and drop the subsequent  
*itaque*; P. does the same, except  
 that he reads *qui* instead of *quae* or  
*quia*.

§ 208. § 18, tit. I. afd. Comp. Gai. in  
 fr. 111, pr. D. *de R. I.* (l, 17).

<sup>1</sup> Comp. § 197.

inpuberem si proximus pubertati<sup>2</sup> sit et ob id intellegat se delinquere.

209 Qui res alienas rapit, tenetur etiam furti: quis enim magis alienam rem inuito domino contrectat quam qui rapit? <sup>1</sup> itaque *recte dictum* est eum inprobum furem esse: sed propriam actionem eius delicti nomine praetor introduxit quae appellatur ui bonorum raptorum, et est intra annum quadrupli,<sup>2</sup> post annum simpli: quae actio utilis est etsi quis unam rem, licet minimam, rapuerit.

210 Damni iniuriae actio constituitur per legem Aquilianam,

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is close upon puberty and therefore understands that he is committing an offence.

209 He also who takes anything belonging to another by robbery, is held guilty of theft; for who can with more truth be said to meddle with another man's property without its owner's consent than he who takes it away by force? He is therefore rightly spoken of as an atrocious thief. The praetor, however, has introduced an action appropriate to this particular offence under the name of *actio ui bonorum raptorum*, for fourfold the value of the thing stolen if raised within the year, and for the single value afterwards; and it is competent even though but a single thing, however trifling, has been carried off.

210 The *actio damni iniuriae* was introduced by the Aquilian

<sup>2</sup> Comp. § 109.

§ 209. Comp. tit. I. VI *BONORVM RAPTORVM* (iv, 2), and particularly the principium.

<sup>1</sup> The Inst. have *quam qui ui rapit*, and most eds. introduce the *ui* into the text of Gai. But if it were a necessary adjunct one would have equally to correct the initial and final words, and read *qui res alienas ui rapit*, and *ui rapuerit*.

<sup>2</sup> The ms. has *quadrupli actio*, but the latter word has been expunged as a gloss.

§§ 210-219. Comp. tit. I. DE *LEGE AQUILIA* (iv, 3). This law, according to Th. (iv, 3, § 15) and a scholiast of the Bas. (lx, 3, l. 1), was a plebiscite enacted at the instance of a tribune of the name of Aquilius, at a crisis in the feud between the senate and the people;

a date which historians are inclined to identify with the third secession in 467 | 287, and probably immediately after the passing of the *lex Hortensia*, which gave plebiscits the force of *leges*.

In a passage in Cicero (*Brut.* xxxiv, 131) it is called the *L. Aquilia de iustitia*; for the two latter words Orelli substitutes *damni iniuriae*; Hu. (*Beitr.* p. 106) is of opinion they should be *de rupitias*. We know from Festus, under the words *Rupitias* and *Sarcito* (Bruns, pp. 261, 264), that the XII Tables contained a law (or laws) in which those words occurred; and many civilians are of opinion that they constituted or formed part of a provision such as *rupitias sarcito, rupitias qui faxit sarcito, qui rupitias dederit sarcito*, or the like,—‘let

- cuius primo capite cautum est [*ut*] si quis hominem alienum, *alienamue* quadrupedem quae pecudum numero sit, iniuria occiderit, quanti ea res in eo anno plurimi fuerit,<sup>1</sup> tantum<sup>2</sup>
- 211 domino dare damnetur. iniuria autem occidere intellegitur cuius dolo aut culpa id acciderit, nec ulla alia lege damnum quod sine iniuria datur reprehenditur; itaque inpunitus est qui sine culpa et dolo malo casu quodam damnum committit.<sup>1</sup>
- 212 Nec solum corpus in actione huius legis aestimatur; sed sane *si*<sup>1</sup> seruo occiso plus dominus capiat damni quam pretium serui sit, id quoque aestimatur, ueluti si seruus meus ab aliquo heres institutus, antequam iussu meo hereditatem cerneret,<sup>2</sup> occisus fuerit: non enim tantum ipsius pretium aestimatur, sed et hereditatis amissae quantitas. item si ex

- law; whose first chapter provides that he who wrongfully kills another man's slave, or a quadruped of his cattle, shall be condemned to pay the owner a sum equal to the highest
- 211 value it could have fetched during the year. He is held to have killed wrongfully to whose dole or fault death is attributable, there being no law that imputes blame for loss occasioned without wrong-doing; therefore a man goes unpunished who, by some accident, and without fault or dole,
- 212 does some damage to another's property. It is not the mere *corpus* that is considered in measuring damages under this enactment; for there is no question that if a slave be killed, and the consequent loss to his owner be greater than his intrinsic value, that also will be taken into account. For example, if a slave of mine, who has been instituted heir by some one, be killed before he has by my authority declared his acceptance of the inheritance, not only his individual value will fall within the assessment, but also the amount of the inheritance that has thus gone past me. So too if one

him who has destroyed property replace it.\* (See the literature on the subject in Sell, *die Actio de rupitiis sarciendis der XII Tafeln*, Bonn, 1877). It was to amend this very vague and general provision, together with all subsequent legislation on the subject of *damnum iniuria* not of a special character, that the Aquilian law was enacted (fr. 1, pr. D. *ad leg. Aquil.* ix, 2); hence, if Hu. be right, its name of *L. Aquilia de rupitiis*.

- § 210. Pr. tit. I. *afid.* The words of cap. i. are given by Gai. in fr. 2, pr. D. *ad leg. Aquil.* (ix, 2).

<sup>1</sup> For meaning of *quanti ea res fuerit* see fr. 179, fr. 193, D. *de V. S.* (I, 16).

<sup>2</sup> The words of the enactment were *tantum aes dare domino damnas esto* (see ii, § 201, note 2), which has induced Hu. to interpolate *aes* after *tantum*.

§ 211. Comp. Vlp. in *Collat.* vii, 3, §§ 1, 4; §§ 2, 3, 14, tit. I. *afid.*

<sup>1</sup> *Casus . . . a nullo praestantur*, fr. 23, D. *de R. I.* (I, 17).

§ 212. Comp. § 10, tit. I. *afid.*

<sup>1</sup> The Ms. has *sanei*; Hu. changes it into *si ueluti*.

<sup>2</sup> Comp. ii, 87; Vlp. xix, 19.



- gemellis uel ex comoedis uel ex symphoniaciis unus occisus fuerit, non solum occisi fit aestimatio, sed eo amplius [*id*]<sup>3</sup> quoque computatur quod ceteri qui supersunt depretiati sunt. idem iuris est etiam si ex pari mularum unam uel etiam ex
- 213 quadrigis equorum unum occiderit. Cuius autem seruus occisus est, is liberum arbitrium habet uel capitali crimine reum facere eum qui occiderit, uel hac lege damnum persequi.
- 214 Quod autem adiectum est in hac lege: QVANTI IN EO ANNO PLVRIMI EA RES FVERIT, illud efficit, si clodum puta aut luscum seruum occiderit qui in eo anno integer fuerit, [*ut non quanti [clodus aut luscus, sed quanti integer fuerit]*]<sup>1</sup> aestimatio fiat; quo fit ut quis plus interdum consequatur quam ei damnum datum est.
- 215 Capite secundo [*aduersus*] adstipulatorem<sup>1</sup> qui pecuniam in fraudem stipulatoris acceptam fecerit,<sup>2</sup> quanti ea res est,<sup>3</sup>
- 216 tanti actio constituitur. qua et ipsa parte legis damni

- of twins, or one of a company of actors or musicians be killed, not only his separate value will be taken account of, but also the depreciated value of those that remain. And so also if one of a pair of mules be killed, or even one of a team of four
- 213 chariot horses. A man whose slave has been killed has it in his option either to proceed against the delinquent by prosecution for a capital crime, or to sue him for damages under
- 214 this enactment. The introduction in the enactment of the words, 'Whatever within the year was the highest value of the thing,' has this effect,—that if it is a lame or one-eyed slave that has been killed, but who has been sound during the year, the measure of damages will be *not his value as lame or one-eyed, but his value as sound and whole*; so that it may sometimes happen that an owner will recover more than covers the loss he has sustained.
- 215 By the second chapter of the same Aquilian law an action for the value involved is allowed against an adstipulator who, in fraud of the stipulant, has granted the debtor a discharge
- 216 by acceptilation. It is plain as regards this part also of

<sup>3</sup> Supplied from Inst.

§ 213. Comp. § 11, tit. I. afd.

§ 214. Comp. § 9, tit. I. afd.

<sup>1</sup> The words in ital. are Huschke's; Bk., K. u. S., and other eds., interpolate to the same effect; P. is content with *ita*.

§ 215. Comp. § 12, tit. I. afd.

<sup>1</sup> Comp. §§ 110, 117.

<sup>2</sup> Comp. § 169.

<sup>3</sup> See § 210, note 1.

§ 216. An adstipulator acceptilating in fraud of the stipulant destroyed and deprived him of an incorporeal item of his estate (ii, 14), viz. his claim against his debtor; there was therefore *damnum iniuria datum*.

nomine actionem introduci manifestum est: sed id cauere non fuit necessarium, cum actio mandati ad eam rem sufficeret;<sup>1</sup> nisi quod ea lege aduersus infitiantem in duplum agitur.<sup>2</sup>

- 217 Capite tertio de omni cetero damno cauetur. itaque si quis seruum uel eam quadrupedem quae pecudum [*numero est [uulnerauerit, siue eam quadrupedem quae pecudum]*] numero non est, ueluti canem, aut feram bestiam, ueluti ursum, leonem uulnerauerit uel occiderit, hoc capite actio constituitur: in ceteris quoque animalibus, item in omnibus rebus quae anima carent, damnum iniuria datum hac parte uindicatur; si quid enim ustum aut ruptum aut fractum [*fuert*], actio hoc capite constituitur, quamquam potuerit sola rupti appellatio in omnes istas causas sufficere: ruptum [*enim intellegitur quod quoquo [modo corruptum]*] est; unde non solum usta [aut rupta]<sup>1</sup> aut fracta, sed etiam scissa et conlisa et effusa et quoquo modo uitata aut<sup>2</sup> perempta atque deteriora facta hoc uerbo continen-

the enactment, that it was because of damage done that the action was introduced. The provision, however, would hardly have been necessary, and an action of mandate would have been sufficient to meet the case but for this,—that in the action under the statute the condemnation of a defender denying his liability is in double damages.

- 217 In the third chapter provision is made for all other cases of damage to property. Therefore, if any one *have wounded a slave, or a quadruped of a man's cattle, or have wounded or killed a quadruped that is not of his cattle*, such as a dog, or a wild beast, such as a bear or a lion, a remedy is provided by this clause. In the case of other animals, as well as of inanimate things generally, if wrongful damage be done to them, redress is given by this same part of the enactment, which confers a right of action wherever anything has been burned, destroyed, or broken. This enumeration is almost unnecessary, seeing that the single word *ruptum*, destroyed, includes all three—*ruptum* in fact *being equivalent to corruptum, spoiled, no matter in what way*; therefore not only things burned, destroyed, or broken, but also things cut, bruised, emptied out, or in any way vitiated, demolished, or deteriorated,

<sup>1</sup> Comp. § 111. Notwithstanding what Gai. says there and here, it is extremely doubtful whether an *actio mandati* was known to the law at the time of the enactment of the *L. Aquilia*.

<sup>2</sup> Comp. iv, §§ 9, 171.

§ 217. § 13, tit. I. affd., from which the

words in ital., omitted in the ms., are supplied. Comp. Vlp. in *Collat.* ii, 4; xii, 7.

<sup>1</sup> Not in Inst.; apparently a gloss.

<sup>2</sup> These two words also omitted from the Inst. Hu. reads—*uitata itaque perempta aut deteriora*.

- 218 tur. Hoc tamen capite non quanti in eo anno, sed quanti in diebus xxx proximis ea res fuerit, damnatur is qui damnum dederit; ac ne 'plurimi' quidem uerbum adicitur: et ideo quidam putauerunt liberum esse *iudici*<sup>1</sup> ad id tempus ex diebus xxx aestimationem redigere quo plurimi res fuerit, uel ad id *quo* minoris fuerit: sed Sabino placuit proinde habendum ac si etiam hac parte 'plurimi' uerbum adiectum esset; nam legis latorem contentum fuisse, [*quod* 219 [*prima parte eo uerbo usus esset.*]<sup>2</sup> Ceterum placuit ita demum ex ista lege actionem esse si quis corpore suo damnum dederit; *ideoque*<sup>1</sup> alio modo damno dato utiles actiones<sup>2</sup> dantur, ueluti si quis alienum hominem aut pecudem incluserit et fame necauerit, aut iumentum tam uehementer egerit ut rumperetur; item si quis alieno seruo persuaserit ut in arborem ascenderet uel in puteum descenderet, et is ascendendo aut descendendo ceciderit [*et*] aut mortuus fuerit aut aliqua parte corporis laesus sit; item<sup>3</sup> si quis alienum seruum de ponte aut

- 218 are covered by this one word. Under this clause, however, he who has done the damage is condemned, not in the value the thing has borne during the year, but in its value during the thirty days immediately preceding. As the word 'highest' is not added, some have thought that it was in the discretion of the judge to put upon the thing either its highest value during the thirty days, or any lower value it possessed during that period; but according to Sabinus the clause is to be read as if it contained the word 'highest,' the author of the law having contented himself *with mentioning it in the first clause.*
- 219 It has been held that the statute confers a right of action then only when a man has caused damage with his body, [*i.e.* by his own direct act.] *Utiles actiones*, however, are granted when it has been done in any other way; as, for example, when a man has shut up another's slave or beast, and caused it to die of starvation, or driven another's horse so hard as to cause it to founder; likewise if he have persuaded another man's slave to mount a tree or descend a well, and the slave falls in mounting or descending, and is either killed, or hurt in some part of his body; so also if he have pushed another

§ 218. Comp. §§ 14, 15, tit. I. afd.

<sup>1</sup> The ms. has *iudicium*.

<sup>2</sup> Omitted in the ms.; supplied from Inst.

§ 219. Comp. § 16, tit. I. afd.

<sup>1</sup> This word is taken from the Inst.; the ms. has *quo*.

<sup>2</sup> See ii, 78, note 1.

<sup>3</sup> For *item* K. u. S., following the Inst., substitute *sed*, Hu. substituting *at enim uero*; the *quamquam* *hic* is omitted by K. u. S., and by Hu. changed into *hunc quoque*. The object of both is to make the



ripa in flumen proiecerit et is suffocatus fuerit, quamquam hic<sup>3</sup> corpore suo damnum dedisse eo quod proiecerit non difficiliter intellegi potest.

- 220 Iniuria autem committitur non solum cum quis pugno puta aut fuste percussus uel etiam *uerberatus* erit, sed et si cui conuicium factum fuerit, siue quis bona alicuius quasi debitoris sciens eum nihil sibi debere proscripserit,<sup>1</sup> siue quis ad infamiam alicuius libellum aut carmen scripserit, siue quis matremfamilias aut praetextatum adsectatus fuerit, et denique  
221 aliis pluribus modis. Pati autem iniuriam uidemur non solum per nosmet ipsos, sed etiam per liberos nostros quos in potestate habemus, item per uxores nostras cum in manu nostra sint;<sup>2</sup> itaque si *Titiae*, filiae mae,<sup>2</sup> quae Titio nupta est,

man's slave off a bridge or river bank into the water whereby he is drowned, (although here it can easily be seen that, by the push given to the slave, the delinquent did the mischief by his direct act.)

- 220 [Personal] injury is committed not only when one is struck say with the fist or with a stick, or when he is flogged, but also when he is opprobriously addressed in public; when a man announces the sale, as if in bankruptcy, of the goods of one who he pretends is his debtor, but who, as he well knows, is not indebted to him at all; when one writes defamatory matter about another either in prose or verse; when one persistently follows an honest woman or a young lad; and in  
221 many other ways besides. We may suffer injury not only in our own persons, but also in those of our children in

statement of Gaius not only agree with that of Justinian, but be consistent in itself. Just. denies that an *utilis actio* was required, the direct one being competent, as the damage was *corpore datum*; Cai. admits that the damage was so caused, yet declares an *utilis actio* to be the proper remedy. But there was room for argument that the *damnum* was not *corpore datum*,—that it was due not to the push from the bridge, but to the subsequent suffocation, which might not have happened had the slave been able to swim. This view,—that the death was only indirectly due to the push,—may have been the prevailing one in the time of Gai., though disapproved by him and departed from by Just.; therefore I prefer,

with P., to let the text stand as in the ms.

§§ 220-225. Comp. tit. I. *DE INIURIIS* (iv, 4).

§ 220. Comp. § 1, tit. I. *afid.*; Paul. v, 4, §§ 1, 3, 4, 14 f.

<sup>1</sup> See § 78.

§ 221. Cp. § 2, tit. I. *afid.*; Paul. v, 4, § 3.

<sup>1</sup> K. u. S. and Hu., following L., read *quamuis in manu [non] sint*; Gou., M. (K. u. S. p. xxii), and P. approve the reading of the ms. There is really no more reason for changing the statement about the wife than for making the reference to children run *quamuis eos in potestate non habemus*.

<sup>2</sup> The ms. has *uelitiae filiae*; P. reads *Gaiae Titiae filiae meae*; K. u. S. simply *filiae meae*; Hu. *ueluti filiaefamiliae meae*,—admis-



- iniuriam feceris, non solum filiae nomine tecum agi iniuriarum  
 222 potest, uerum etiam meo quoque et Titii nomine. Seruo  
 autem ipsi quidem nulla iniuria intellegitur fieri, sed domino  
 per eum fieri uidetur: non tamen isdem modis quibus etiam  
 per liberos nostros uel uxores iniuriam pati uidemur, sed ita  
 cum quid atrocius commissum fuerit quod aperte in con-  
 tumeliam domini fieri uidetur, ueluti si quis alienum seruum  
 uerberauerit; et in hunc casum formula proponitur; at si quis  
 seruo conuicium fecerit uel pugno eum percusserit, non pro-  
 ponitur ulla formula, nec temere petenti datur.
- 223 Poena autem iniuriarum ex lege XII tabularum propter  
 membrum quidem ruptum talio erat: propter os uero fractum  
 aut conlisum trecentorum assium poena erat, ueluti si libero  
 os fractum erat; at si seruo, CL: propter ceteras uero iniurias  
 XXV assium poena erat constituta. et uidebantur illis tem-  
 poribus in magna paupertate satis idoneae istae *pecuniariae*  
 224 *poenae*.<sup>1</sup> Sed nunc alio iure utimur: permittitur enim

- potestate* and our wives *in manu*; therefore if you have done  
 injury to my daughter who is married to Titius, action will  
 lie against you on account of it not only in name of my  
 222 daughter but also in mine and in that of Titius. A slave  
 cannot himself be held to have suffered injury; but it may  
 be done to his owner through him. Through him, however,  
 we do not suffer it in the same ways as through our children  
 or wives, but only when something very atrocious has been  
 done to him, which is obviously intended as an insult to us,  
 as when some one has flogged him; for such a case there is a  
 formula in the edict; but there is no formula there to meet  
 the case of opprobrious language addressed to him, or a blow  
 given him with the fist, nor, if one were asked for, would it  
 be granted without mature consideration.
- 223 By the Twelve Tables the penalties of [personal] injury  
 were,—for destruction of any of the members, talion; for a  
 bone broken or dislocated, three hundred *asses* if the sufferer  
 was a freeman, a hundred and fifty if a slave; for any other  
 injury, twenty-five *asses*. In those times of great poverty  
 224 these money penalties were deemed sufficient. But now the

sible only on his theory that *manus*  
 was immaterial as regarded the hus-  
 band's right to sue.

§ 222. § 3, tit. I. afd.

§ 223. § 7, tit. I. afd. Comp. Schoell,  
*Tab. viii*, cap. 2, 3, 4; Fest. v.  
*Talionis* (Bruns, p. 269); Gell. xx,

1, §§ 12-18; Paul. v, 4, §§ 6, 7;  
 Paul. in *Collat.* ii, 5, § 5.

<sup>1</sup> So K. u. S., following G. and  
 Bk.; the ms. has *pecuniae poenae*;  
 Hu. adds *esse*.

§ 224. Comp. Paul. v, 4, § 7; Paul. in  
*Collat.* ii, 6; § 7, tit. I. afd.

nobis a praetore *ipsis* iniuriam aestimare, et iudex uel tanti condemnat quanti nos aestimauerimus, uel minoris, *prout ei* uisum fuerit; sed cum atrocem iniuriam praetor aestimare soleat, si simul constituerit quantae pecuniae nomine fieri debeat uadimonium,<sup>1</sup> hac ipsa quantitate taxamus formulam,<sup>2</sup> et iudex, *quammis* possit uel minoris damnare, plerumque tamen propter ipsius praetoris auctoritatem non audet minuere  
 225 condemnationem.<sup>3</sup> Atrox autem iniuria aestimatur uel ex facto, ueluti si quis ab aliquo uulneratus aut uerberatus fustibusue caesus fuerit; uel ex loco, ueluti si cui in theatro aut in foro iniuria facta sit; uel ex persona, ueluti si magistratus iniuriam passus fuerit, uel senatoribus ab humili persona facta sit iniuria.

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law is different; we are now allowed by the praetor to put our own estimate on the injury done us, and the judge may condemn in the full amount of it or in a smaller sum as he thinks fit. But as it is the practice of the praetor himself to put an estimate on injury of atrocious character, if he have once fixed what shall be the amount of the security to be found by the defender for his appearance at the trial, we then tax our formula at the same figure; and although it is in the power of the judge to give less, yet in deference to the praetor's authority he seldom ventures to limit the condemnation.  
 225 An injury is esteemed atrocious either by reason of the nature of it, as when a man is wounded, or flogged, or beaten with sticks; or by reason of the place, as when an injury is done to a man in a theatre or in the forum; or by reason of the person, as when injury has been suffered by a magistrate, or when it is done to a senator by a man of the lower orders.

<sup>1</sup> See iv, §§ 184–186.

<sup>2</sup> Comp. iv, 51.

<sup>3</sup> See iv, 52.

§ 225. § 9, tit. I. *afd.* Comp. Paul. v, 4, § 10; Paul. in *Collat.* ii, 2. The

par. finishes on line 11, p. 187; and a little lower, in another hand, we have—LIB. III. EXPLICIT. The next page (188) is blank.

## [COMMENTARIVS QVARTVS.]

- 1 [*Superest ut de actionibus loquamur. Quod si quaeratur*] quot genera actionum sint, uerius uidetur duo esse, in rem et in personam: nam qui III esse dixerunt ex sponsionum generibus, non animaduenterunt quasdam species actionum  
 2 inter genera se rettulisse.<sup>1</sup> In personam actio est qua agimus cum aliquo <sup>1</sup> qui nobis uel ex contractu uel ex delicto obligatus est, id est cum intendimus <sup>2</sup> dare, facere, praestare oportere.<sup>3</sup>

- 1 *There remains for consideration the subject of actions. If it be asked how many genera of them there are, the more correct answer seems to be that there are two,—actions in rem and actions in personam; those who, taking into account the different sorts of actio per sponsionem, have maintained that there are four, have not observed that they were confounding*  
 2 *genus and species. That action is in personam whereby we proceed against some person who is under obligation to us by reason either of contract or delict; that is to say, when we contend that he ought to give us something, or do something*

§§ 1–10. Comp. tit. I. DE ACTIONIBVS (iv, 6).

§ 1. Comp. pr. § 1, tit. I. afd.; Vlp. in fr. 25, pr. D. de O. et A. (xliv, 7). The first five words in ital. are from pr. tit. I. afd., the last three conjectural, but more than probable. Those words represent the contents of the first line of p. 189 of the ms., which is vacant.

<sup>1</sup> The four here alluded to, according to Hu., founding on §§ 4, 91, 95, were—(1) *personalis actio*; (2) *petitoria formula*; (3) *in rem actio per sponsionem cuius summa per formulam petitur*; (4) *per sponsionem cuius summa sacramenti actione petitur*,—the last three being varieties of the *actio in rem*.

§ 2. References as in § 1.

<sup>1</sup> The ms. has *qua agimus quotiens cum aliquo*. Hu. transposes *quo-*

*tiens*, and, instead of *cum intendimus* (as in the ms.), reads *quotiens eum intendimus*.

<sup>2</sup> Comp. § 41.

<sup>3</sup> For the meanings of *dare* and *facere*, as descriptive of the matter of an obligation, see iii, 92, note. The formula (§ 30) *dare oportere* was employed when the pursuer's claim was for something definite, which he averred the defender was bound to give him in property (*certi conductio*); *dare facere oportere*—for *facere oportere* never stood alone—was employed where the pursuer, after stating in a *demonstratio* (§ 40) the ground of his action, asked a judgment as to what in the circumstances the defender should give (in the technical sense) or do (*incerti conductio*).

There is more difficulty about

- 3 In rem actio est cum aut corporalem rem intendimus nostram esse, *aut* ius aliquod nobis competere, uelut utendi aut utendi fruendi, *eundi*, agendi, aquamue ducendi uel altius tollendi prospiciendiue: actio<sup>1</sup> ex diuerso aduersario  
4 est *negatiua*. Sic itaque discretis actionibus certum est non posse nos rem nostram ab alio ita petere: SI PARET EVM DARE OPORTERE; nec enim quod nostrum est nobis dari potest, cum scilicet id dari nobis intellegatur quod [*ita datur ut*] nostrum fiat; nec res quae nostra [*iam est, nostra*] amplius fieri potest.<sup>1</sup> plane odio furum, quo magis pluribus actionibus teneantur, receptum<sup>2</sup> est ut extra poenam dupli aut quadrupli

- 3 for us, or make us some other prestation. It is *in rem* either when we contend that some corporeal is ours, or that we are entitled to some right, such as one of usufruct, of foot or carriage way, of drawing water, of building higher, or of having a prospect. The action competent to our adversary,  
4 on the other hand, is negative of those rights. [Real and personal] actions being thus differentiated, it is clear that in claiming from another what is ours we cannot do so in the form, 'Should it appear that he ought to give;' for what is our own cannot be given to us, seeing that to give us a thing means to so give it that it shall become ours; but what is already ours cannot be made more ours than it is already. Nevertheless, in detestation of thieves, and to make them responsible in a greater number of actions, it has been received as law that, over and above the double and quadruple

*praestare*. There is no instance of *praestare oportere* in a formula, either alone or in conjunction with other words. Some have held it intended to cover the *damnum decidere*, and such like phrases employed in actions *ex delicto* (§ 37); others that it refers to the possible secondary claims arising out of *bonae fidei* obligations, such as responsibility for *culpa*, eviction, *mora*, etc.; others again that it was meant to apply to the claim in an action with a formula *in factum concepta* (§ 46), *dare* and *dare facere oportere* being confined to formulae *in ius conceptae* (§ 45). The probability is that, as being, like *praestatio*, a word of very general meaning, it was intended to include every personal claim not covered by *dare* or *dare facere*.

§ 3. Comp. §§ 41, 87; §§ 1, 2, tit. I. afd.; fr. 25, pr. D. *de O. et A.* (xliv, 7).

<sup>1</sup> Before *actio* K. u. S., on the suggestion of M., interpolate *quibus casibus*, Hu. *item*. P. reads—*actio ex diuerso aduersario [contraria nihilo minus etiam actio est in rem, quamquam] est negatiua*. The reference is to what was technically called *actio negatoria*,—that whereby a proprietor sought to have it judicially declared that his property was free from some pretended servitude or other burden; see fr. 5, § 6, D. *si ususfr. pet.* (vii, 6).

§ 4. § 14, tit. I. afd., from which the passages in ital. are supplied.

<sup>1</sup> Comp. iii, 99.

<sup>2</sup> Hu., following Inst., substitutes *effectum*.



rei recipiendae nomine<sup>3</sup> fures *etiam*<sup>4</sup> hac actione teneantur: si  
 PARET EOS DARE OPORTERE,<sup>5</sup> quamuis sit etiam aduersus eos  
 5 haec actio qua rem nostram esse petimus. Appellantur  
 autem in rem quidem actiones uindicationes, in personam  
 uero actiones quibus dari fieriue oportere intendimus, con-  
 dictiones.  
 6 Agimus autem interdum ut rem<sup>1</sup> tantum consequamur, in-  
 7 terdum ut poenam tantum, alias ut rem et poenam. Rem  
 tantum persequimur uelut actionibus [*quibus*]<sup>1</sup> ex contractu  
 8 agimus. Poenam tantum *persequimur*<sup>1</sup> uelut actione furti  
 et iniuriarum, et secundum quorundam opinionem actione ui-  
 bonorum raptorum: nam ipsius rei et uindicatio et conditio  
 9 nobis competit. Rem uero et poenam persequimur uelut ex  
 his causis ex quibus aduersus infitiantem in duplum agimus;  
 quod accidit per actionem iudicati,<sup>1</sup> depensi,<sup>2</sup> damni *iniuriae*

penalties to which they are subject, they are also liable to an  
 action [for the value of stolen goods] in the form, 'Should  
 it appear that they ought to give;' although there also lies  
 against them the action whereby we claim a thing as ours.

5 Actions *in rem* are called vindications; while those in which  
 we contend that something ought to be given to or done for  
 us are called condictiones.

6 Sometimes we proceed in an action solely to obtain a thing,  
 sometimes solely to obtain a penalty, sometimes for both  
 7 purposes at once. In actions upon contract, for example,  
 8 we sue only for a thing. We sue only for a penalty in the  
 actions of theft and personal injury; to which some add  
 robbery, seeing that for the thing taken from us we have a  
 9 vindication or condiction. We sue for both thing and  
 penalty in those cases in which we claim double the value on  
 the defender's denial; which happens in the action upon a  
 judgment, the *actio depensi*, the action upon the Aquilian law

<sup>3</sup> See iii, §§ 189, 190.

<sup>4</sup> So the Inst.; the ms. has *ex*.

<sup>5</sup> Comp. ii, 79, last clause.

§ 5. Comp. § 15, tit. I. *afid.* It should  
 be noticed that Gai. limits the *con-*  
*dictio* to personal actions proceeding  
 on a *dare* or *dare facere*; see § 2,  
 note 3.

§ 6. Comp. § 16, tit. I. *afid.*

<sup>1</sup> *Res* here includes *factum prae-*  
*standum*,—what we ask shall be  
 done for us, as well as what we ask  
 shall be given us.

§ 7. Comp. § 17, tit. I. *afid.*

<sup>1</sup> Added by L., and adopted by  
 most eds.; Hu. does without it by  
 dropping the final *agimus*.

§ 8. Comp. §§ 18, 19, tit. I. *afid.*; Just.  
 differs as to the character of the *a.*  
*ui bonor. raptor*.

<sup>1</sup> The ms. has *consequimur*.

§ 9. Comp. § 171; Paul. i, 19, § 1;  
 § 19, tit. I. *afid.*

<sup>1</sup> See Cic. *pro Flacco*, xxi, 49.

<sup>2</sup> Comp. iii, 127; below, § 22.

^ *in personam*

*legis Aquiliae*,<sup>3</sup> aut legatorum nomine quae per damnationem certa relicta sunt.<sup>4</sup>

10 Quaedam praeterea sunt actiones quae ad legis actionem exprimuntur, quaedam sua vi ac potestate constant: quod ut manifestum fiat, opus est ut prius de legis actionibus loquamur.

11 Actiones quas in usu ueteres habuerunt legis actiones appellabantur, uel ideo quod legibus proditae erant, (quippe tunc edicta praetoris, quibus conplures actiones introductae sunt, nondum in usu habebantur,) uel ideo quia ipsarum legum uerbis accommodatae erant et ideo inmutabiles proinde atque leges obseruabantur: unde *cum quis*<sup>1</sup> de uitibus succisis ita egisset ut in actione 'uites' nominaret, responsum [*est*] eum rem perdidisse, quia debuisset 'arbores' nominare eo quod lex

on account of wrongful damage, and the action to recover a legacy of definite amount bequeathed by damnation.

10 Further, there are some actions that are expressly founded on some *legis actio*, others that are effectual on their own inherent merits. To make this distinction clear, we must first explain the nature of the *legis actiones*.

11 The actions employed by our ancestors were called *legis actiones* either because they had been introduced by *leges*, legislative enactments, (the edicts of the praetor, which were subsequently a fertile source of actions, not being then in use), or because the very words of the laws to which they were due were imported into them, so that in style they became as immutable as those laws themselves. Hence, when a man who was proceeding against another for cutting down his vines used the word 'vines' in his action, it was ruled that he had lost his case,—that he ought to have employed the word 'trees,' seeing that the law of the Twelve Tables,

<sup>3</sup> Comp. iii, §§ 210, 216.

<sup>4</sup> Comp. ii, §§ 201, 282; iii, 175.

§ 10. Comp. §§ 31a, 32, 33.

§ 11. Comp. Pompon. in fr. 2, §§ 6, 12, 38, D. *de O. I.* (i, 2). See also Varro, *de L. L.* vi, 30 (Bruns, p. 277).

The phrase *legis actiones* is used by Gai. in two different senses. In one, as in the *sacramenti actio* of § 13, it means the *modus agendi*, the form of procedure; and of these there were five, which are enumerated in § 12. In the other it means the particular action made use of, as

the *actio arborum furtim caesarum* alluded to in this par.; these were very numerous, — there probably was one for every law that was contravenable,—but most of them explicated by sacramental procedure. It is to be borne in mind that certain non-contentious proceedings, whose form was prescribed by statute, were also called *legis actiones*, as, for example, in *iure cessio* (ii, 24).

<sup>1</sup> The Ms. has *eum qui*, retained by K. u. S.; but this necessitates the deletion of *eum* after *responsum est*.

- XII tabularum, ex qua de uitibus succisis actio competeret, 12 generaliter de arboribus succisis loqueretur.<sup>2</sup> Lege autem agebatur modis quinque, sacramento, per iudicis postulationem, per conductionem, per manus iniunctionem, per pignoris capionem.
- 13 Sacramenti actio generalis erat: de quibus enim rebus ut aliter ageretur lege cautum non erat, de his sacramento agebatur.<sup>1</sup> eaque actio perinde periculosa erat falsi — — ;<sup>2</sup>

- under which an action for vines cut down was competent, 12 spoke in general terms of the cutting down of 'trees.' The procedure in those *legis actiones* was in one or other of five modes,—by sacrament, by petition for a judge, by conduction, by personal arrest, or by distress.
- 13 The sacramental procedure was general in its application; for wherever no other mode was prescribed by statute, this was followed. It was a perilous procedure for the [*false*

<sup>2</sup> Comp. fr. 1, fr. 2, fr. 3, pr. D. *arb. furt. caes.* (xlvii, 7). That an action should be thrown out on such a technicality seems on the first blush very shocking. Yet it is no more than an anticipation of a rule of modern practice,—that in a statutory prosecution any variance from the words of the statute will be fatal to the charge, as, for example, saying that an act was done 'wickedly and feloniously,' instead of 'wilfully, maliciously, and unlawfully' (case of *Affleck*, 1 Br. 354).

- § 12. *Sacramento*, §§ 13-17; *per conductionem*, §§ 18-20; *per manus iniunctionem*, §§ 21-25; *per pignoris capionem*, §§ 26-29. The description of the procedure *per iudicis postulationem* is lost. On all these see Karlowa, *R. CP.*

- § 13. Gaius' account of the *actio sacramenti* is unfortunately very incomplete. It begins on p. 191 of the MS., but p. 192 is undecipherable, and the final sentences were on a leaf between pp. 194 and 195, that seems to have been cut out by the writer of the superimposed St. Jerome. We are thus left to a great extent in the dark as to the true nature of the procedure.

The difference between two definitions of *sacramentum* given by Festus (Bruns, p. 262),—in one of which it is spoken of as an oath of

verity, and in the other (agreeing with the statement of Varro, *de L. L.* v, 180) as a sum of money staked by each of the parties, to abide the issue of the suit and to be forfeited by the loser,—has led to a host of more or less conjectural explanations. A classification of them is given by Danz, *Z. f. RG.* vi, 339; and amongst subsequent publications illustrative of the subject may be mentioned Karlowa, as in last note; Huschke, *Multa*; and Muenderloh, *ueber Schein und Wirklichkeit an der legis actio sacramenti in rem*, *Z. f. RG.* xiii, 445.

<sup>1</sup> It was the general mode of procedure both in real and personal actions, and in the latter whether the claim arose *ex contractu* or *ex delicto*. Comp. § 20.

<sup>2</sup> Eight letters illegible, — the more remarkable that the line in which they occur and the two that follow, i.e. from *falsi* to *uictus erat*, are accidentally repeated in the MS. He. proposes *falsis sacramentis*; Rudorff *falsidicis*; Danz, *falsi sacramenti causa*; M. (K. u. S. p. xxii), *falsi damnatis* or *falsi conuictis*; Hu., *falsiloquo propter iusiurandum* (*falsilog pp ii*). This last recommends itself as in harmony with the immediately following *reo propter sponsionem* and *actori propter restipulationem*; but its acceptance

- atque hoc tempore periculosa est actio certae creditae pecuniae propter sponsionem qua periclitatur reus si temere neget,<sup>3</sup> [et] restipulationem qua periclitatur actor si non debitum petat:<sup>4</sup> nam qui uictus erat summam sacramenti praestabat poenae nomine,<sup>5</sup> *eaque in publicum cedebat praedesque eo nomine praetori dabantur*,<sup>6</sup> non ut nunc sponsionis et resti-
- 14 pulationis poena lucro cedit *aduersario qui uicerit*. Poena autem sacramenti aut quingenaria erat aut quinquagenaria: nam de rebus mille aeris plurisue quingentis assibus, de minoris uero quinquaginta assibus sacramento contendebatur; nam ita lege XII tabularum cautum erat. [at] si de libertate hominis controuersia erat, etsi pretiosissimus homo esset, tamen ut L assibus sacramento contenderetur

- [*swearer*]; in the same way as at the present day the action for a definite sum of money due is perilous for a defender rashly denying his liability, on account of his sponsion, and for a pursuer claiming what is not due to him, on account of his restipulation. For he who was defeated forfeited the amount of his sacrament by way of penalty; it fell to the state, and sureties were given for it to the praetor, instead of its becoming so much gain to the successful adversary, as does the amount of the sponsion or restipulation under the present
- 14 system. The sacramental penalty was either five hundred or fifty *asses*,—five hundred when the object of litigation was valued at or over a thousand, fifty when less than that; so it was provided by the law of the Twelve Tables. If, however, the dispute was as to the freedom of an alleged slave, then, although he might be ever so valuable, the same law provided that the parties should contend by sacrament with fifty *asses*,

depends upon the prior consideration whether Hu. is right in regarding the *sacramentum* as an oath of verity. ✕

<sup>3</sup> Comp. § 171.

<sup>4</sup> Comp. § 180.

<sup>5</sup> Comp. Varro, *de L. L.* v, 180.

The question, so far as the *sacramentum* was concerned, was, whose was just, whose unjust, — *utrius sacramentum iustum, utrius iniustum sit*; see Cic. *pro Caec.* xxxiii, § 97; *pro Mil.* xxvii, § 74; *pro domo*, xxix, § 78. He whose *sacramentum* was pronounced just recovered his deposit, while the other party forfeited his.

<sup>6</sup> The giving of sureties for the

money was the later practice; in the earlier, according to Varro (as in last note), it was actually deposited *ad pontem*, and probably in the hands of the pontiffs, who he says (v, 83) had constructed the bridge *ut in eo sacra et uis et cis Tiberim non mediocri ritu fiant*. Ihering, (in *G. d. R. R.* i, p. 298,) founding on Pomp. in fr. 2, § 6, D. *de O. I.* (i, 2), thinks that originally the whole procedure was before one of the pontiffs, and that the forfeited deposit was a payment to the college for its judicial services, i.e. that it was court dues.

§ 14. Comp. Fest. v. *Sacramentum* (Bruns, p. 262); Varro, *de L. L.* v, 180.

✕ which the phrase *poena sacramenti* § 14 tends to confirm



eadem lege cautum est, fauore scilicet libertatis,<sup>1</sup> ne onera-  
 14arentur adsertores.<sup>2</sup> [14a] — — — — — . [15] —  
 15 — — — — — ad iudicem accipiendum uenirent; postea  
 uero reuersis dabatur. *ut* autem [die] xxx. iudex daretur<sup>1</sup>  
 per legem Pinariam<sup>2</sup> factum est; ante eam autem *legem*

and that out of favour for freedom, and that those acting on  
 the pretended slave's behalf should not be unduly burdened.  
 14a — — — — — . [15] — — — — — should  
 15 appear to receive a judge; and the appointment was made on  
 their return. That he should be appointed on the thirtieth  
 day was a provision of the Pinarian law; prior to its enact-

<sup>1</sup> Liv. iii, 44 f.

<sup>2</sup> P. has *ne morarentur adsertores*. No one who was claimed as a slave could maintain his defence in person; he had to be represented by an *adsertor libertatis*.

§ 14a. On p. 192 of the ms. the only letters legible are *sin* on l. 5, *iudg. s* on l. 6, *staeommesaones* on l. 12, *onecassae* on l. 17, *ecaptus* on l. 18, and *ad iudicem accipund* at the end of l. 24 (the last on the page).

Hu. thinks that lines 1 to middle of 11 may have run to the following effect: — *E' diuerso, si inter populum et priuatum controuersia erat uel ad centumuiros ibatur, siue res mille aeris plurisue siue minoris esset, sacramenti poena ex lege Hateria Tarpeia a praetore aestimabatur, modo ne minor quingentis neque maior III milibus aeris statueretur. praeterea lege Iulia Papiria cautum est, ne pluris quam ipsa res esset sacramentum statueretur. si uero magistratus pro populo agebat, etiam priuatus tantum sacramento interrogabatur. idque semper fiebat, cum ex lege aliqua eum, qui contra legem fecisset, in sacrum iudicare licebat, id est ut a magistratu sacramento interrogaretur, se contra legem non fecisse*. As authorities he refers to § 95; *lex Silia de pond.* as in Fest. v. *Publ. pondera* (Bruns, p. 40); *Lex de infer.* v. 6 (C. I. L., i, 1409, p. 263); Cic. *de Rep.* ii, 35, § 60; Fest. v. *Sacramentum, Sacramento* (Bruns, p. 262).

§ 15. Hu. supposes that the par. began on l. 11, and proposes the following reconstruction:—*Ceterum cum etiam istae omnes actiones, quibus sacra-*

*mento agebatur, aut in rem aut in personam essent, si in personam agebatur, cum uterque in ius uenisset, actor id, quod sibi ab altero dari fieriue oporteret, apprehendens eum intendebat, uelut hoc modo: AIO TE MIHI HS. X MILIA DARE OPORTERE. aduersarius negabat. deinde actor dicebat: QVANDO NEGAS, SACRAMENTO QVINGENARIO TE PROVOCO. aduersarius quoque dicebat: QVANDO AIS EGOOUE ABS TE EA RE CAPTVS SVM, SIMILITER EGO TE SACRAMENTO QVINGENARIO PROVOCO. Itaque uterque alterum sacramento (in fano Iouis uel Dii Fidi) adigebat, die tamen demum XXX. iudicem accipiebant et litem contestabantur, id est uterque nominata causa litis dicebat: STLITEM MIHI TECVM ESSE EFFOR, TESTES ESTOTE! quam ob rem in eum diem inuicem sibi denuntiabant ut in ius ad iudicem, etc.* Huschke's principal authorities are—for the first part of his reconstruction, Valer. Prob.; and for the second Paul. ex Festo, v. *Contestari* (Bruns, p. 239), and Diomed. *Ars gramm.* i, p. 378, ed. Keil.

<sup>1</sup> Comp. Ps.-Ascon. in *II. Verr.* i, 26 (Bruns, p. 292).

<sup>2</sup> Mommsen, Rudorff, and Hu. identify this law with one referred to by Macrob. *Sat.* i, 13, § 21, as dealing with the matter of intercalation, and which he says was enacted in the consulate of L. Pinarius and P. Furius, i.e. in 282 | 472 (Liv. ii, 56). With Voigt (*Ius. Nat.* ii, p. 187), I am inclined to think that the enactment to which Gai. refers must have been later, not earlier, than

*statim*<sup>3</sup> dabatur iudex. illud ex superioribus intellegimus, si de re minoris quam [*M*] aeris agebatur, quinquagenario sacramento, non quingenario eos contendere solitos fuisse. Postea tamen quam iudex datus esset conperendinum diem ut ad iudicem uenirent denuntiabant;<sup>4</sup> deinde cum ad iudicem uenerant, antequam apud eum *causam* perorarent, solebant breuiter ei et quasi per indicem rem exponere: quae dicebatur causae *coniectio*,<sup>5</sup> quasi causae suae in breue coactio.

- 16 Si in rem agebatur, mobilia quidem et mouentia, quae modo in ius adferri adduciue possent, in iure uindicabantur ad hunc modum: qui uindicabat<sup>1</sup> festucam tenebat; deinde ipsam rem adprehendebat, ueluti hominem, et ita dicebat: HVNC EGO HOMINEM EX IVRE QVIRITIVM MEVM ESSE AIO SECVNDVM SVAM

ment the judge was named at once. As we have seen already, it was with a sacrament of fifty *asses*, and not five hundred, that the parties contended where the object in dispute was of less value than a thousand. On the judge being appointed they cited each other to attend him on the third day thereafter. When they had come before him, and before entering upon the merits of his case, each explained shortly and in outline the leading points of it; this was called the *causae coniectio*,—an epitome of the whole cause.

- 16 When the proceedings were *in rem*, moveable and self-moving things that could be carried or brought into court were vindicated in this way: the vindicant held in his hand a rod; then he took hold of the thing in dispute, say a slave, and made his averment thus: 'I say that this man is mine in quiritarian right, on the title I have already explained; behold, I have laid my *uindicta* upon him;' and at the same moment

the XII Tables. He suggests the year 322 | 432, when L. Pinarius Mamercinus Rufus and L. Furius Medullinus Fusus were two of the military tribunes; and thinks Varro, whom Macrob. cites as his authority, may have made the mistake of confounding the military tribunes with the earlier consuls of the same name.

<sup>3</sup> Before Studemund's revision of the Verona Codex most eds. were in the habit of reading *nondum* instead of *statim*; thus inferring that it was the L. Pinaria that first authorized remit to a single judge instead of to the centumviral court.

<sup>4</sup> Comp. Cic. *pro Mur.* xii, 27; Ps.-Ascon. as in note 1; Paul. ex Festo, v. *Res conperendinata* (Bruns, p. 260); Gell. x, 24, § 9.

<sup>5</sup> The ms. has *collectio*. But see Ps.-Ascon. as in note 1; fr. 1, D. *de R. I.* (l, 17).

- § 16. Comp. ii, 24, containing the formula of *in iure cessio*, which was nothing else than a *rei uindicatio* arrested in its first stage, because of no opposition on the part of the nominal respondent.

<sup>1</sup> 'Id est, qui iudex erat. Vt autem *iudex* est is qui iudicat ubi et quid sit *ius*, sic *iudex* ubi et quae sit *uis* demonstrat,' Polenaar.

CAVSAM,<sup>2</sup> SICUT DIXI; ECCE TIBI, VINDICTAM INPOSVI,<sup>3</sup> et simul homini festucam inponebat. aduersarius eadem similiter dicebat et faciebat.<sup>4</sup> cum uterque uindicasset praetor dicebat: MITTITE AMBO HOMINEM. illi mittebant. qui prior uindica[uerat ita alterum interroga]bat:<sup>5</sup> POSTVLO ANNE DICAS QVA EX CAUSA VINDICAVERIS? ille respondebat: IVS

he touched him with the rod. Thereupon the other party spoke and acted in like manner. Each having thus vindicated, the praetor said: 'Both of you let the man alone.' They did so. He who had made the first vindication then interrogated the other thus: 'I ask you, will you state upon what title you have vindicated?' to which the other party

<sup>2</sup> There is some difference of opinion as to the meaning of the words *sec. suam causam*, and their relation to the immediately following *sicut dixi*. Hu. holds that the words *sec. suam causam* were intended as an affirmation that the pursuer was claiming the slave as already his on a sufficient title, and not now claiming him for the first time as in an *in iure cessio*; further, that the *sicut dixi* has no particular reference to the *sec. suam causam*, but is the connecting link between the two parts of the *uindicatio*,— 'as I have asserted my ownership by word of mouth, so do I now by my act.' K. u. S. also disconnect *sicut dixi* from what goes before, from which it may perhaps be inferred that they put the same meaning as Hu. upon *sec. suam causam*.

I am disposed, however, to hold by the older idea—still maintained by several of the later civilians of eminence, for instance Ihering (*G. d. R. R.* iii, p. 88)—that the *sec. suam causam*, *sicut dixi* refer to a previous informal statement by the first vindicant of the title upon which he maintained his ownership; without it he could hardly in fairness ask his adversary what was his title. But, although this may account for the introduction of the words into the ritual of the *uindicatio*, it is not to be supposed that they would be used *only* when a preliminary statement of his title had actually been made by the first

vindicant; they became words of style, spoken as of course.

<sup>3</sup> P. thinks *inposui* a gloss, (1) as unwarranted by the *S. S. C. S. D. E. T. V.* of Valer. Prob., and (2) as inconsistent with the immediately following *simul inponebat*.

<sup>4</sup> That the respondent (*aduersarius*) contravindicated, or at least made a counter averment of ownership in the same terms as the first vindicant, and accompanied by the same ceremonial, is denied by some jurists, on the ground that the result might be a judicial finding that neither party was owner; and they impute to Gai. an inaccuracy, due they think to his unfamiliarity with a procedure that had become a mere matter of history. But we have other authority for it in Plaut. *Rud.* iv, 3, l. 84; Cic. *pro Mur.* xii, 26 (*fundus Sabinus meus est: immo meus*); and Gai. himself in his description of *in iure cessio* (ii, 24). The action was in fact originally a *duplex iudicium*; which may account for Gai. not calling the parties *actor* and *reus* (pursuer and defender), but *qui uindicabat* or *qui prior uindicabat* in the one case, and *aduersarius* in the other.

<sup>5</sup> Added by G., and adopted by most eds. Hu. has *qui prior uindica[uerat ita aduersarium, et rursus post ita alterum interroga]bat*. This interrogatory is probably the earliest specimen of the *interrogatio in iure* that played an important part in judicial procedure at a later period; see tit. D. *de interrog. in iure* (xi, 1).

FECI SICVT VINDICTAM INPOSVI. deinde qui prior uindica-  
uerat dicebat: QVANDO TV INIVRIA VINDICAVISTI, D AERIS SACRA-  
MENTO TE PROVOCO; aduersarius quoque dicebat similiter:<sup>6</sup> ET  
EGO TE; [scilicet L asses sacramenti nominabant.]<sup>7</sup> deinde  
*eadem sequebantur quae cum in personam ageretur.*<sup>8</sup> postea  
praetor secundum alterum eorum uindicias dicebat,<sup>9</sup> id est  
interim aliquem possessorem constituebat, eumque iubeat  
praedes<sup>10</sup> aduersario dare litis et uindiciarum, id est rei et  
fructuum:<sup>11</sup> alios autem praedes ipse praetor ab utroque acci-  
piebat sacramenti, quod id in publicum cedebat. festuca  
autem utebantur quasi hastae loco, signo quodam iusti  
dominii, [quod] maxime<sup>12</sup> sua esse credebant quae ex hostibus

replied: 'I have done what I had a right to do in lay-  
ing my *uindicta* upon him.' Then again the first: 'Since  
you have vindicated without right, I challenge you with a  
sacrament of fifty *asses*;' to which the other answered in like  
manner: 'And I you.' Then followed the same procedure as  
in the *actio in personam*. When it was completed the praetor  
granted the *uindiciae* or interim possession to one or other  
of them, requiring him to give sureties to his adversary *litis  
et uindiciarum*, i.e. for the thing itself and its profits; and he  
further required each of them to furnish sureties for his  
sacrament, because that was to fall to the state. The rod  
spoken of was used in place of a spear, the symbol of lawful  
ownership, men esteeming those above all things to be theirs  
which they had taken from an enemy; wherefore it is that a

<sup>6</sup> Other eds. put this word *similiter*  
into the mouth of the respondent as  
part of his challenge.

<sup>7</sup> The ms. has *scil.l asses*, etc.  
K. u. S. interpolate, and read *scilicet*  
[*si de re maioris quam M aeris age-*  
*batur, D, si de minoris,*] *L asses*,  
etc.; Hu.—*scilicet* [*si de re minoris*  
*quam M aeris agebatur,*] *L asses*, etc.  
Gou. regards *scil* and the three words  
that follow as a gloss, and the  
second *l* as merely a mis-spelling.  
I also read them as a gloss, but one  
which in the second *l* makes a very  
proper correction. The illustration  
Gal. is employing is a vindication of  
a slave, and he consequently errs  
(§ 14) in speaking of challenge with  
a sacrament of five hundred *asses*;  
says the glossarist—'it was fifty.'  
In the translation I have made the

correction in the first instance and  
omitted the gloss.

<sup>8</sup> Comp. § 15.

<sup>9</sup> Comp. Fest. v. *Vindiciae* (Bruns,  
p. 272). Most authors are of opinion  
that the *uindiciae* were granted as  
a matter of course to the *de facto*  
possessor at the moment. Ihering  
(*G. d. R. R.* iii, p. 102, note 129c)  
combats this view, holding that  
the matter was one entirely in the  
discretion of the magistrate, who  
acted on his first impression of the  
justice of the case.

<sup>10</sup> Comp. Paul. ex Festo, v. *Praes*  
(Bruns, p. 256); Varro, de *L. L.* vi,  
74 (Bruns, p. 278).

<sup>11</sup> Comp. § 94; Ps.-Ascon. in *II.*  
*Verr.* i, 115 (Bruns, p. 293).

<sup>12</sup> The ms. has *dominio XXI.*  
*me.*



cepissent; unde in centumviralibus iudiciis<sup>13</sup> hasta prae-  
 17 ponitur.<sup>14</sup> Si qua res talis erat ut sine incommodo non  
 posset in ius adferri uel adduci, ueluti si columna<sup>1</sup> aut grex  
 alicuius pecoris esset, pars aliqua inde sumebatur, deinde in  
 eam partem quasi in totam rem praesentem fiebat uindicatio;  
 itaque ex grege uel una ouis aut capra in ius adducebatur, uel  
 etiam pilus inde sumebatur et in ius adferebatur; ex naue  
 uero et columna aliqua pars defringebatur. similiter si de  
 fundo uel de aedibus siue de hereditate controuersia erat, pars  
 aliqua inde sumebatur et in ius adferebatur, et in eam partem  
 perinde atque in totam rem praesentem fiebat uindicatio, ueluti  
 ex fundo gleba sumebatur et ex aedibus tegula, et si de here-  
 ditate controuersia erat aequae — — — — —.<sup>2</sup>

17a — — — — — .

17 spear is set up in front of the centumviral bench. If the  
 thing in question was such as could not conveniently be carried  
 or brought into court, a pillar, for example, or a flock or herd  
 of animals, a part was taken and the vindication made upon  
 it as if the whole had been there; a single sheep or goat of a  
 herd was driven into court, or perhaps only a little of the  
 wool or hair of one of them taken into it; while from a ship  
 or a pillar a small portion was broken off. In like manner if  
 the dispute was about land or houses, or about an inheri-  
 tance, some small part was taken into court, and the vindica-  
 tion made upon it as if the whole had been there; for  
 example, a turf was taken from the land or a tile from the  
 house; and if the thing in controversy was an inheritance,  
 then too — — — — — .

17a — — — — — .

<sup>13</sup> Comp. Cic. *de Orat.* i, 28, § 173;  
 Paul. ex Festo, v. *Centumviralia*  
 (Bruns, p. 238); Quintil. *I. O.* v, 2,  
 § 1. According to Cic. the centum-  
 vival court seems to have been a  
 competent forum in a great range  
 of cases; but in the time of Gai.,  
 according to the prevalent opinion,  
 it sat only for the trial of some  
 questions of inheritance. See below,  
 § 31.

<sup>14</sup> Comp. Suet. *Aug.* 36; Quintil.  
 as in last note.

§ 17. See Cic. *pro Mur.* xii, 26, where  
 he narrates with much ridicule the  
 procedure followed when lands were  
 in dispute; see further the ingenious  
 explanation of its origin and import

by Muenderloh, as quoted in § 13  
 note; also Gell. xx, 10.

<sup>1</sup> P. interpolates *aut nauis*.

<sup>2</sup> The par. probably concluded with  
*res aliqua inde sumebatur*, or words  
 to the same effect; they are wanting  
 in the ms., as explained in next note.

§ 17a. Between what are numbered  
 pp. 194 and 195 of the ms. a leaf is  
 amissing, cut out, as Stud. thinks,  
 by the writer of St. Jerome's  
 Epistles. We thus lose 48 lines of  
 the text, which contained the con-  
 clusion of the account of the *legis*  
*actio sacramento*, the whole account  
 of that *per iudicis postulationem*,  
 and part of the account of that *per*  
*condictionem*.

- 17b — — — — — ad iudicem capiendum *praesto esse deberent*.<sup>1</sup> *condicere* autem *denuntiare* est *prisca lingua*.<sup>2</sup>
- 18 Itaque haec quidem actio proprie *condictio* uocabatur: nam actor aduersario *denuntiabat* ut ad iudicem capiendum die xxx. adesset; nunc uero non proprie *condictionem* dicimus actionem in personam [*esse qua*]<sup>1</sup> intendimus *dari*<sup>2</sup> nobis oportere: nulla enim hoc tempore eo nomine *denuntiatio* fit.
- 19 Haec autem legis actio constituta est per legem Siliam et Calpurniam; lege quidem Silia certae pecuniae, lege uero
- 20 Calpurnia de omni certa re. Quare autem haec actio desi-

- 17b — — — — —, when they should be bound to attend to have a judge appointed. For *condicere* in early Latin meant
- 18 the same as *denuntiare*, to give formal notice. This procedure therefore was quite properly called *condictio*; for the pursuer gave notice to his opponent to appear on the thirtieth day for the appointment of a judge. In now giving the name of *condiction* to the personal action in which we maintain that something ought to be given to us, our language is not so appropriate; for at the present day there is no notice given
- 19 such as we have been speaking of. This *legis actio* was established by the Silian and Calpurnian laws; the Silian law introducing it in the case of money due of definite amount, the Calpurnian extending it to every other thing that was
- 20 definite and certain. But it may well be asked what was

17b. See last note. The first line and a half of p. 195 is illegible.

Hu. conjecturally supplies the first part of the par. thus: *Per condictio-nem tantum agebatur de his rebus quas nobis dari oportet, quam actionem etiam nunc conductionem uocamus. Et perinde hoc modo agebant, detracto tamen ipso sacramento, ac si sacramento in personam ageretur.* The line and a half at top of p. 195 he thus reconstructs: *observabant enim eundem diem et aequalem modum capiendi iudicis condicendique diem quo ad iudicem, etc.*

<sup>1</sup> Of *deberent* (Hu.) only the first two letters are legible; K. u. S. and P. prefer *debebant*.

<sup>2</sup> Comp. Paul. ex Festo, v. *Condicere* (Bruns, p. 239); § 15, I. *de act.* (iv, 6).

§ 18. Comp. §§ 5, 33; § 15, I. *de act.* (iv, 6).

<sup>1</sup> These two words supplied from the Inst.

<sup>2</sup> The ms. has *id*.

§ 19. There is no means of fixing the dates of those two enactments with anything like certainty. While Voigt (*Iust. Nat.* iv, 401) puts the *L. Silia* between 311 | 443 and 329 | 425, and Ihering (*G. d. R. R.* ii, p. 390) attributes it to the first half of the fifth century (u. c.), Hu. (*Multa*, p. 492) thinks it cannot have been earlier than the first half of the sixth century, and possibly the same year (510 | 244) as the *L. Silia* regulating weights and measures. But this brings it too near, and even postpones it to, the introduction of the formular system sanctioned by the *lex Aebutia*, if 507 | 247 be the proper date of that law. See § 30, note 1.

§ 20. Comp. § 13. The *condictio* had this very obvious advantage,—that it did not necessitate the appearance of the parties in court until they met for the appointment of a *iudex*.

derata sit, cum de eo quod nobis dari oportet potuerimus sacramento aut per iudicis postulationem agere, ualde quaeritur.

- 21 Per manus iniectionem aequae [*de*] his rebus agebatur de quibus ut ita ageretur lege aliqua<sup>1</sup> cautum est, uelut iudicati lege XII tabularum:<sup>2</sup> quae actio talis erat. qui agebat sic dicebat: QVOD TV MIHI IVDICATVS (siue DAMNATVS)<sup>3</sup> ES SESTERTIVM X MILIA, QVANDOC<sup>4</sup> NON SOLVISTI, OB EAM REM EGO TIBI SESTERTIVM X MILIVM IVDICATI MANVM INICIO, et simul aliquam partem corporis eius predebatur; nec licebat iudicato manum sibi depellere et pro se lege agere, sed uindicem<sup>5</sup> dabat qui pro se causam agere solebat: qui uindicem non dabat domum

the need for it, seeing that where it was alleged that something 'ought to be given,' action was already competent either by sacrament or by petition for a judgment.

- 21 *Manus iniectio* was employed in those cases in which it was expressly prescribed by statute, as, under the provisions of the Twelve Tables, in proceedings upon a judgment. The procedure was as follows:—the pursuer addressed the other party thus: 'Whereas by judgment' (or 'by damnation') 'you are indebted to me in the sum of ten thousand sesterces, inasmuch as you have not paid them, in respect thereof I now lay hands upon you for ten thousand sesterces of judgment debt;' and at the same time he laid hold of some part of the body of his debtor. The latter was not allowed to resist the arrest or defend himself in person, but had to provide a [substitute, called a] *uindex*, who acted on his behalf; if he failed to provide one, he was carried home by the arrester and put in

Further, the court was one presided over by the praetor; and if Ihering (see above, § 13, note 6) be right in thinking that the sacramental procedure took place before a pontiff, this was in itself a mighty change, —the substitution of a civil for an ecclesiastical tribunal.

- § 21. Comp. the *lex Coloniae Iuliae Genetivae* (see above, i, 22, note 1), c. 61, in *Ephem. Epigraph.* iii, 91; *Serv. ad Aen.* x, 419 (Bruns, p. 298).

<sup>1</sup> So G. and most eds.; the ms. has *Aquilina*.

<sup>2</sup> Comp. Gell. xx, 1, § 45; Schoell, *Tab.* iii, 1–4.

<sup>3</sup> Keller (*R. CP.* § 19) proposes to add *siue CONFESSVS*. *Damnatus* refers to the *damnas esto* of a *nexum*, testament, or penal statute; see ii, 201, note 1.

<sup>4</sup> So the ms., and approved by Karlowa (*R. CP.* p. 157) and by K. u. S.; Festus (ed. Mueller, p. 258) says that so *quando* was spelt in the XII Tables. G., whose reading was followed for some time, had *quae dolo malo*. Hu. in his second edition, on the authority of M., substituted *quae ad hoc*; in his two later editions he has [*aeque*] *quando oportet*. P. has *quando causam*.

<sup>5</sup> Comp. Fest. v. *Vindex* (Bruns, p. 272); Gell. xvi, 10, § 5. The creditor's right over his debtor's person being in question, the latter could not act for himself; the *uindex* took his place much in the same way as did an *adsertor libertatis* (§ 14, note 2) in a *uindicatio in seruitutem*. See § 16, note 1.

- 22 ducebatur ab actore et uinciebatur.<sup>6</sup> Postea quaedam leges ex aliis quibusdam causis pro iudicato manus iniunctionem in quosdam dederunt, sicut lex Publilia in eum pro quo sponsor dependisset, *si* in sex mensibus proximis quam pro eo depensum esset non soluisset sponsori pecuniam; item lex Furia de sponsu aduersus eum qui a sponsore plus quam uirilem partem exegisset, et denique conplures aliae leges in
- 23 multis causis talem actionem dederunt. Sed aliae leges ex quibusdam [*causis*] constituerunt <sup>1</sup> [*in*] *quosdam* <sup>2</sup> actiones per manus iniunctionem, sed puram, id est non pro iudicato, uelut *lex* [*Furia*] testamentaria <sup>3</sup> aduersus eum qui legatorum nomine mortisue causa plus *M*<sup>4</sup> assibus cepisset, cum ea lege non esset exceptus ut ei plus capere liceret; item lex Marcia <sup>5</sup>

- 22 chains. Some subsequent laws allowed *manus iniectio pro iudicato*, as upon a judgment, in certain other cases. It was allowed, for example, by the Publilian law against a debtor who had failed within six months to refund to a sponsor who had paid his debt for him; the Furian law respecting suretyship allowed it against a creditor who had exacted from one of several sponsors more than his proportion of the debt; and by numerous other statutes it was sanctioned in a variety
- 23 of other cases. A different set of enactments authorized in certain cases what was called *manus iniectio pura*, that is, not proceeding upon the footing of a judgment; the Furian testamentary law, for instance, allowed it against a man who had taken more than a thousand asses in name of legacy or other singular *mortis causa* gift, he not being one of the excepted individuals who, under its provisions, might take a greater sum; and the Marcian law against usury provided

<sup>6</sup> Comp. *L. Col. Iul. Genetivae*, as above; Gell. xx, 1, § 45. The *lex Poetilia* of 429 | 325 or 441 | 313—see Liv. viii, 28; Varro, *de L. L.* vii, 105 (ed. Muell. p. 162, in preference to Bruns, p. 281)—has generally been supposed to have abolished the imprisonment, and chains, and slavery or death that often followed the *manus iniectio*; but the words of the *L. Col. Iul. Genetivae*, probably of the year 710 | 44, are—*ni uindicem dabit iudicatumue faciet, secum ducito; iure ciuili uinctum habeto*. See also the statement of Gai. in § 25. This imprisonment however was meant simply to secure the person of

the debtor; the creditor's real satisfaction could only come out of his estate.

§ 22. Comp. iii, § 121 (*L. Furia*), § 127 (*L. Publilia*).

§ 23. <sup>1</sup> The ms. has—*Sed aliae leges in multis causis ex quibusdam si constituerunt*; the reading above is that of Gou., followed by K. u. S.

<sup>2</sup> *In quosdam* due to Hu., following § 22; the ms. has *quasdam* without *in*; P. substitutes *quidem*.

<sup>3</sup> See ii, 225. Instead of *lex Furia* the ms. has *lege*.

<sup>4</sup> The ms. has *C*.

<sup>5</sup> Enacted 402 | 352 (Liv. vii, 21).



- aduersus faeneratores, ut si usuras exegissent, de his reddendis
- 24 per manus iniectionem cum eis ageretur. Ex quibus legibus et si quae aliae similes essent cum agebatur, manum sibi depellere et pro se lege agere [*reo licebat*]: nam et actor in ipsa legis actione non adiciebat hoc uerbum PRO IUDICATO, sed nominata causa ex qua agebat ita dicebat: OB EAM REM EGO TIBI MANVM INICIO; cum hi quibus pro iudicato actio data erat, nominata causa ex qua agebant, ita inferebant: OB EAM REM EGO TIBI PRO IUDICATO MANVM INICIO: nec me praeterit in forma legis Furiae testamentariae PRO IUDICATO uerbum inseri, cum in ipsa lege non sit; quod uidetur nulla
- 25 ratione factum. Sed postea lege Vallia, excepto iudicato et eo pro quo depensum est, ceteris omnibus cum quibus per manus iniectionem agebatur permissum est sibi manum depellere et pro se agere: itaque iudicatus et is pro quo depensum est etiam post hanc legem uindicem dare debebant, et nisi darent domum ducebantur.<sup>1</sup> *istaque*<sup>2</sup> quamdiu legis

- that if a lender exacted interest upon his loan, *manus iniectio*
- 24 might be used upon him to compel its restitution. In the case of arrest under these enactments, and any similar ones (if there were such), it was lawful for the arrested party to resist and defend himself in person. For here the pursuer, in reciting the words of style, did not make use of the phrase 'as upon a judgment,' but, specifying the ground of his action, said simply, 'in respect thereof I lay hands upon you.' Those on the other hand to whom the action as if upon a judgment was allowed, after specifying the ground of it, used the words, 'in respect thereof I lay hands upon you as upon a judgment.' I am aware that in the formula employed in proceedings under the Furian testamentary law the words 'as upon a judgment' are inserted, though they are not in the law itself;
- 25 but this appears to me unwarranted. Subsequently, by the Vallian law, all against whom proceedings might be taken by *manus iniectio*, except judgment debtors and principals for whom a sponsor had made payment, were permitted to resist the arrest and defend in person. The judgment debtor, however, and the principal indebted to his sponsor, had still, notwithstanding this enactment, to find a substitute; on failure they were carried home by their creditors. And so it always

§ 24. The words *reo licebat* are Huschke's; previous eds. have only *licebat*.

§ 25. On the *lex Vallia*, see iii, 121, note.

<sup>1</sup> See *L. Col. Iul. Genetinae*, as in § 21, note.

<sup>2</sup> The ms. has *itaque*; K. u. S. and P., following L., *idque*.

actiones in usu erant semper ita obseruabantur; unde nostris temporibus is cum quo iudicati depensiue agitur iudicatum solui satisfacere cogitur.<sup>3</sup>

- 26 Per pignoris capionem lege agebatur de quibusdam rebus  
 27 moribus, [*de quibusdam*]<sup>1</sup> lege. Introduta est moribus rei  
 militaris: nam et propter stipendium licebat militi ab eo qui  
 distribuebat,<sup>1</sup> nisi daret, pignus capere; dicebatur autem ea  
 pecunia quae stipendii nomine dabatur aes militare.<sup>2</sup> item  
 propter eam pecuniam licebat pignus capere ex qua *equus*<sup>3</sup>  
 emendus erat, quae pecunia dicebatur aes equestre:<sup>4</sup> item  
 28 propter eam pecuniam ex qua hordeum equis erat conpa-  
 randum, quae pecunia dicebatur aes hordiarium.<sup>5</sup> Lege  
 autem introduta est pignoris capio, ueluti lege XII tabularum  
 aduersus eum qui hostiam emisset nec pretium redderet;<sup>1</sup>

was while the *legis actiones* continued in use; wherefore it is that even now, in an action upon a judgment, and in an *actio depensi*, the defender must give security for payment of the sum in which he may eventually be condemned.

- 26 The *legis actio* by *pignoris capio* or distress was introduced  
 27 in some cases by custom, in others by statute. It was in-  
 troduced by custom in some matters affecting the army: for a  
 soldier could distrain upon the paymaster if his pay or *aes*  
*militare* was in arrear; and a knight could distrain for the  
*aes equestre* or sum to which he was entitled for the purchase  
 of a horse, and for his *aes hordiarium* or forage money.  
 28 The Twelve Tables authorized it against him who had pur-  
 chased a victim for sacrifice but failed to pay the price; as

<sup>3</sup> Comp. § 102.

§ 26. Gell. (vi, 10) says that the proper spelling is *capio*, not *captio*; the latter form, however, occurs once or twice in the Verona ms.

<sup>1</sup> Added by G., and substantially adopted by all subsequent eds.

§ 27. Comp. Fest. v. *Vectigal* (Bruns, p. 271).

<sup>1</sup> The ms. has *distruibat*; Hu. has *qui id iis tribu[ere] deb[ebat]*; K. u. S. and P. *qui [id] distribuebat*. The paymaster, against whom the *capio* was competent, was the *tribunus aerarius*; Paul. ex Festo, v. *Aerarii tribuni*.

<sup>2</sup> The army first began to receive pay in 349 | 405, Liv. iv, 59. Comp. Varro, de *L. L.* v, §§ 181, 182

(Bruns, p. 275); Cato apud Gell. vi, 10, § 2.

<sup>3</sup> So Savigny and most eds.; the ms. has *eciuis*; Hu. *equus iis*.

<sup>4</sup> Comp. Paul. ex Festo, v. *Equestre aes* (Bruns, p. 241); this *capio* was also against the *tribunus aerarius*, the purchase-money coming from the public; Liv. i, 43.

<sup>5</sup> Comp. Paul. ex Festo, v. *Hordiarium aes* (Bruns, p. 243). As the maintenance of the cavalry horses was a burden upon widows, it was they possibly who were proceeded against; see Liv. i, 43; Cic. de *Re publ.* ii, 20, § 36.

§ 28. <sup>1</sup> Competent, according to Goettling (*Roem. Staatsverfassung*, p. 185), to the colleges of priests, who kept and sold animals fit for sacrifice.

item aduersus eum qui mercedem non redderet pro eo iumento quod quis ideo locasset ut inde pecuniam acceptam in *dapem*, id est in sacrificium, inpenderet;<sup>2</sup> item lege censoria<sup>3</sup> data est pignoris capio publicanis<sup>4</sup> uectigalium publicorum populi Romani aduersus eos qui aliqua lege *uectigalia* deberent.<sup>5</sup>

- 29 Ex omnibus autem istis causis certis uerbis pignus capiebatur, et ob id plerisque placebat hanc quoque actionem legis actionem esse; quibusdam *aliter*<sup>1</sup> placebat, primum quod pignoris capio extra ius peragebatur, id est non apud praetorem, plerumque etiam absente aduersario, cum alioquin ceteris actionibus non aliter uti possent quam apud praetorem praesente aduersario; praeterea quod nefasto quoque die, id est quo non licebat lege agere,<sup>2</sup> pignus capi poterat.

also against the person who failed to pay for a beast which another had let him on hire in order to raise money for an offering to Jupiter Dapalis; and by the censorial law the same remedy was allowed to the farmers of the public revenue

29 against those whose taxes were unpaid. In all these cases the *pignoris capio* was accompanied with a set form of words, and hence it also has generally been accounted a *legis actio*. Some however think that it should not be so regarded, firstly, because it took place *extra ius*, that is, not before the praetor, and often in the absence of the adversary, whereas the other *legis actiones* were competent only before the praetor and in the presence of the adversary; and, secondly, because it might take place on a *dies nefastus* or day upon which procedure by *legis actio* was unlawful.

<sup>2</sup> Twice a year, at the spring and autumn seed-time, it was the custom for the husbandman to offer a feast (*daps*) to Jupiter *dapalis* in imploring rain for his fields and cattle; Cato, *de R. R.* §§ 131, 132; Paul. ex Festo, v. *Daps* (ed. Mueller, p. 68). If, to obtain the wherewithal to make this offering, he had to let out his draught cattle for hire, and this was not paid, then he had *pign. capio* against the hirer.

<sup>3</sup> The *leges censoriae* were the conditions and stipulations contained in the contracts entered into by the censors with the farmers of the revenue and others on behalf of the public; comp. Cic. *de nat. deor.* iii, 19, § 49; *II. Verr.* i, 55, § 143; Varro, *de R. R.* ii, 1, § 16 (Bruns, p. 282).

<sup>4</sup> P. interpolates *id est conductoribus*.

<sup>5</sup> Comp. Cic. *II. Verr.* iii, 11, § 27; 47, §§ 112, 113.

- § 29. Gai. lays stress on the fact that *pignoris capio* began extrajudicially; but so did the *actio sacramenti* (for the *in ius uocatio* was a private act); and so did the *condictio* and the *manus iniectio*. In this respect, therefore, it was not peculiar.

<sup>1</sup> *Aliter* suggested by Gou.; the MS. has *at.*, with a line over the letters. K. u. S. read *autem*, and interpolate *contra*; Hu., following G., also reads *autem*, and interpolates *legis actionem non esse*; P. reads *haud*.

<sup>2</sup> Comp. Varro, *de L. L.* vi, 30 (Bruns, p. 277); Ovid. *Fast.* i, 47; Macrob. *Sat.* i, 16.

- 30 Sed istae omnes legis actiones paulatim in odium uenerunt; namque ex nimia subtilitate ueterum qui tunc iura condiderunt eo res perducta est ut uel qui minimum errasset litem perderet; itaque per legem Aebutiam<sup>1</sup> et duas Iulias<sup>2</sup> sublatae sunt istae legis actiones, effectumque est ut per concepta
- 31 uerba, id est per formulas, litigaremus. Tantum ex duabus causis permissum est lege agere, damni infecti et si centumuirale iudicium *futurum est. sane quidem*<sup>1</sup> cum ad centumuiros *itur*, ante lege agitur sacramento apud praetorem urbanum uel peregrinum;<sup>2</sup> damni uero infecti nemo uult lege agere,<sup>3</sup> sed potius stipulatione quae in edicto proposita

30 But all those *legis actiones* gradually fell into discredit; for, owing to the extreme subtilty of the jurists of the republic, whose province it then was to declare the law, it came about that a litigant making even the slightest mistake lost his cause; therefore, by the Aebutian and two of the Julian laws, the *legis actiones* were abolished, and litigation by certain set forms of words, *i.e. per formulas*, put in place of them.

31 Only in two cases is it still competent to proceed by *legis actio*, namely, in that of *damnum infectum*, and when the action is one to be referred to the centumviral court. When this latter course is in view there must first be a *legis actio* by sacrament before the urban or peregrine praetor; but in the case of *damnum infectum* no one thinks of proceeding by *legis actio*, but rather takes his adversary bound to him by the

§ 30. Comp. §§ 11, 39 f.; Gell. xvi, 10, § 8.

<sup>1</sup> There is great difference of opinion as to the date of this enactment, those suggested ranging from the middle of the fifth to the middle of the seventh century of the city; but the preponderance of surmise attributes it to about the same date as the institution of the peregrin praetorship in 507 | 247. It did not abolish the *legis actiones*, for Cicero speaks of them ten times for once that he mentions the *formulae*; but it probably authorized the praetor to introduce such new judicial remedies as he thought proper alongside of them,—*adiuuandi uel supplendi uel corrigendi iuris civilis gratia, propter utilitatem publicam* (Papin. fr. 7, § 1, D. de I. et I. i, 1).

<sup>2</sup> Comp. § 104. 'The two *leges Iuliae* (presumably the *iudiciariae*

of Augustus) still further restricted the employment of the *legis actiones*. Details are uncertain; but probably they *inter alia* abolished the court of the *decemuires* as an independent one, and diminished the number of the *centumuirales causae*' (Keller, *R. CP.* § 23). See next par.

§ 31. As regards centumviral causes see § 16, note 10. It is the opinion of Bethman-Hollweg (*R. CP.* i, p. 204, note 13), and Karlowa (*R. CP.* p. 216), that *pignoris capio* was the appropriate action of the law for *damnum infectum*; and this view has been given effect to in the text.

<sup>1</sup> So K. u. S.; the ms. has *saneq*; Hu. *saneque*.

<sup>2</sup> After *peregrinum* the ms. has *pr.*, which I take to mean *praetorem*, and have omitted as a gloss.

<sup>3</sup> *Damnum infectum* was damage or danger apprehended from the



est<sup>4</sup> obligat aduersarium suum; itaque et<sup>5</sup> commodius ius et plenius est [quam]<sup>6</sup> per pignoris [caponem].

- 31a — — — — — apparet. [32] Item<sup>1</sup> in ea for-  
 32 mula<sup>2</sup> quae publicano proponitur talis fictio est, ut quanta pecunia olim, si pignus captum esset, id pignus is a quo captum erat luere deberet, tantam pecuniam condemnetur.  
 33 Nulla autem formula ad condictionis fictionem exprimitur: siue enim pecuniam siue rem aliquam certam debitam nobis petamus, eam ipsam dari nobis oportere intendimus, nec ullam adiungimus condictionis fictionem; itaque simul intellegimus

stipulation set forth in the edict, and thus acquires a remedy at once more convenient and more effectual than that by *pignoris capio*.

- 31a — — — — — . [32] So in the formula settled  
 32 to meet the case of a publican [or farmer of the revenue] there is a fiction of this sort,—that whatever sum, had there in former times been a distress, the debtor would have had to pay for redeeming what had been distrained, in that he shall  
 33 be condemned. But no formula contains any reference to a feigned *legis actio per condictionem*. When we claim as due to us either a definite sum of money or any other thing definite and certain, we simply contend that that sum or thing ought to be given to us, and say nothing as to what our right would have been under the older procedure; from which it is to be understood that those formulae in which our contention

ruinous or neglected condition of a neighbour's property. Probably if the owner, on formal warning, failed to make the necessary repairs, the complainer was entitled to resort to *pignoris capio*, take possession, and make them himself. But preference was usually given to the procedure authorized by the edict,—*cautio damni infecti*, followed if necessary by *missio in possessionem*; see § 2, I. *de diu. stip.* (iii, 18).

<sup>4</sup> Comp. *lex Rubria de Gallia cisalpina*, c. 20 (Bruns, p. 88); § 2, I. *de diu. stip.* (iii, 18).

<sup>5</sup> So the ms., *ei* being interlined as a correction of *et*; K. u. S., Hu., and P. *idque et*.

<sup>6</sup> Interpolated to give effect to the view stated above. K. u. S., Hu., and P. make *est* the end of the par., and *per pignoris* the beginning of a

new one, continued on p. 199 (now entirely illegible).

§ 31a. K. u. S. and Hu., following earlier eds., suppose Gai. on p. 199 to have given some further explanation of the *legis actio per pign. capionem*; but this idea is a result of their separation of the words *per pignoris*, at the foot of p. 198, from those immediately preceding them. Gai. seems rather to have dealt with those actions *quae ad legis actionem exprimuntur* (§ 10) by the introduction into the formulae of a reference to the *legis actiones* they had displaced.

§ 32. Comp. § 28.

<sup>1</sup> This word doubtful; G. makes it *uelut*, Hu. and P. *contra*; the proper reading depends on what preceded it, and that is unknown.

<sup>2</sup> The ms. has *forma*.

§ 33. Comp. §§ 18, 19.

eas formulas quibus pecuniam aut rem aliquam nobis dari<sup>1</sup> oportere intendimus sua vi ac potestate ualere. eiusdem naturae sunt actiones commodati, fiduciae, negotiorum gestorum et aliae innumerabiles.

- 34 Habemus adhuc alterius generis fictiones in quibusdam formulis, ueluti cum is qui ex edicto bonorum possessionem petiit ficto se herede agit: cum enim praetorio iure is, non legitimo, succedat in locum defuncti, non habet directas actiones, et neque id quod defuncti fuit potest intendere suum esse, (*neque id quod ei*)<sup>1</sup> *debeatur* potest intendere [*dari*] sibi oportere; itaque ficto se herede intendit ueluti hoc modo: *IVDEX ESTO. SI AVLVS AGERIVS,*<sup>2</sup> id est si ipse actor, *LVCIO TITIO HERES ESSET, TVM SI*<sup>3</sup> *FNVDVM DE QVO AGITVR EX IVRE QVIRITIVM EIVS ESSE PARERET;*<sup>4</sup> — — — —,<sup>5</sup> praeposita *simi-*

is that a sum of money or some other thing ought to be given us, depend for their efficacy on their own inherent strength. And the same may be said of the actions of commodate, fiduciary covenant upon a conveyance, unauthorized management of another person's affairs, and others innumerable.

- 34 We have a different sort of fiction in some formulae, as when a man who, in terms of the edict, has sought possession of the estate of an individual deceased, sues under the pretence that he is heir. Coming in place of the defunct, as he does, by praetorian and not by legal right, he has no direct actions, and can neither maintain that what belonged to his predecessor is his, nor that what was due to the latter ought to be paid to

<sup>1</sup> The ms. has *dare*; but this occurs very frequently in passages in which the eds. have felt themselves constrained to substitute *dari*.

§ 34. <sup>1</sup> Comp. iii, §§ 32, 81.

<sup>2</sup> Hollweg and most eds.

<sup>3</sup> Aulus Agerius and Numerius Negidius are the typical names given by Gai. to the pursuer and defender respectively in his illustrations of the formulae.

<sup>4</sup> The words printed above as *Lucio Titio heres esset tum si* are very much abbreviated in the ms., and anything but distinct.

<sup>5</sup> K. u. S. read '*tum si [eum] fundum de quo agitur ex iure Quir. eius esse oporteret,*' and Hu. and other editors in substantially the same way. All that can be said of the ms. is that for the last three

words it has ten almost undecipherable letters; for while Bl. in his recension thought he could make out *fuisse... t*, Stud. cannot vouch for them. But Gai. says of this action (§ 111)—*imitatur ius legitimum*; what it imitated was the '*si paret hominem ex iure Quir. A. Agerii esse*' of the formular *rei vindicatio* (§ 41); and '*si eius esse pareret*' is a much closer imitation than '*si eius esse oporteret*.' Probably the preference of the editors for the latter locution is due to the fact that it seems employed by Gai. in the formula of the Publician. But it is very questionable whether, for the reason suggested in note 1 to § 36, it can even there be accepted.

<sup>5</sup> K. u. S. (footnote) suggest *et si... debeatur pecunia*; M. (K. u. S.

*liter*<sup>6</sup> *fictione illa*,<sup>7</sup> ita subicitur: TVM SI PARERET<sup>8</sup> NVMERIVM NEGIDIVM<sup>2</sup> [AVLO] AGERIO SESTERTIVM X MILIA DARE OPORTERE.

- 35 Similiter et bonorum emptor ficto se herede agit. sed interdum et alio modo agere solet: nam ex persona eius cuius bona emerit sumpta intentione, conuertit condemnationem in suam personam, id est ut quod illius esset uel illi dari oporteret, eo nomine aduersarius huic condemnnetur: quae species actionis appellatur Rutiliana, quia a praetore Publio Rutilio,<sup>1</sup> qui et bonorum uenditionem introduxisse dicitur, comparata est. superior autem species actionis qua ficto se herede bonorum emptor agit Seruiana<sup>2</sup> [uocatur.
- 36 [*Eiusdem generis est quae Publiciana*]<sup>1</sup> uocatur: datur autem

him. Accordingly, pretending to be heir, he frames his *intentio* thus: 'So and so be judge. Supposing Aulus Agerius,' i.e. the actual pursuer, 'to be the heir of Lucius Titius; if in that case it would appear that the land in question is his in quiritarian right.' [*If the action be for something that was [owing to Lucius Titius]*, the same fiction is prefixed, and the formula proceeds: 'if in that case it would appear that Numerius Negidius ought to give Aulus Agerius ten thousand

- 35 sesterces.' In like manner the purchaser of a bankrupt's estate may sue on the pretence that he is heir. But sometimes he sues in another way; for, allowing the *intentio* to run in the name of the bankrupt whose estate he has purchased, he formulates the clause of condemnation in his own name, that is to say, [he claims] that his adversary shall be condemned to him in respect of what belonged or was due to the bankrupt. This last action is called the Rutilian, having been devised by the praetor Publius Rutilius, the inventor of the procedure by sale of the bankrupt's estate. The other, in which the purchaser proceeds upon a fiction of heirship, is
- 36 called Servian. *The action known as the Publician is of the*

p. xxii) et sic de debito cum; Hu. si uero de debito agatur; P. et si illi debebatur aeque.

<sup>6</sup> So Scheurl (*Beitraege*, p. 132); K. u. S., Hu., and P. have *simili*; the letters that follow in the ms. are uncertain.

<sup>7</sup> So Bl. in his recension of the ms.; K. u. S. and M. have *heredis*; Hu. *intentio*.

<sup>8</sup> So K. u. S. on the suggestion of M.; the ms. has *paret*. But the emendation had previously been suggested by Scheurl, *Beitraege*, p. 133.

§ 35. Comp. iii, §§ 77-81.

<sup>1</sup> See iii, 77, note.

<sup>2</sup> Not to be confounded with the *a. Seruiana de rebus coloni*, § 31, I. *de act.* (iv. 6).

§ 36. Comp. §§ 3, 4, I. *de act.* (iv. 6); fr. 1, pr. D. *de Publ. in rem act.* (vi. 2). The date of the introduction of this action is uncertain. The general opinion is that its author was Q. Publicius, praetor in 685 | 69, the assumption being that it must have been of later date than the ordinary *petitoria in rem for-*

haec actio ei qui ex iusta causa traditam sibi rem nondum usucepit, eamque amissa possessione petit; nam quia non potest eam ex iure Quiritium suam esse intendere, fingitur rem usucepisse, et ita quasi ex iure Quiritium dominus factus esset, intendit ueluti hoc modo: *INDEX ESTO. SI QVEM HOMINEM AVLVS AGERIVS EMIT [ET] IS EI TRADITVS EST, ANNO POSSEDISSET, TVM SI EVM HOMINEM DE QVO AGITVR EX IVRE*  
 37 *QVIRITIVM EIVS ESSE PARERET*<sup>2</sup> et reliqua. Item ciuitas Romana peregrino fingitur si eo nomine agat aut cum eo agatur, quo nomine nostris legibus actio constituta est, si modo iustum sit eam actionem etiam ad peregrinum extendi, uelut si<sup>1</sup> furti nomine agat peregrinus aut cum eo [*agatur*;

*same sort.* It is granted to a person who, before completing his usucapion, has lost the possession of a thing that has been delivered to him on a good title, and who now claims it. As he is not in a position to aver that it is his in quiritarian right, a fiction of usucapion is introduced, and, as if he had really become quiritarian proprietor, he formulates an *intentio* in these terms: 'So and so be judge. Suppose such or such a slave, whom Aulus Agerius bought, and who was delivered to him, to have been possessed by him for a year; if it would appear in such case that said slave is his in quiritarian right,' etc. Roman citizenship is also fictitiously attributed to a peregrin who is either suing or being sued in an action upon some law of our own, if it be reasonable that it should be extended to peregrins, as, for example, if he sue [*or be sued*] in an *actio furti*. [*If he be sued*] the formula runs

*mula* (§ 41), which, from the way it is mentioned by Cic. *II. Verr.* ii, 12, § 31 (*anno* 684 | 70), is thought not to have been then very long in use. Voigt however, (*Ius. Nat.* iv, p. 505,) attributes it to M. Publicius Malleolus, praetor 516 | 238; holding that originally its formula was not petitory, but *per sponsonem mere praeiudicalem*, like the ordinary *rei uindicatio* (§ 93), without any fiction of completed usucapion.

<sup>1</sup> So most eds.; K. u. S. have *item usucapio fingitur in ea actione quae Publiciana*, etc.

<sup>2</sup> The ms. has *oret*, which most editors render *oporteret*; Scheurl (*Beitraege*, p. 133) and Kuntze (*R.R.* ii, p. 226) have *pareret*. *Oportere* is a word of style appropriate to

an *actio in personam*, and altogether out of place in one *in rem*. 'It is the technical expression for the *necessitas alicuius soluendae rei* that creates the *vinculum iuris* of an obligation' (Scheurl). But the contention of the pursuer in the Publician, like that of the *bonorum possessor* (§ 34), was that the object of dispute was *already* his, not that it *ought to be* his.

§ 37. Comp. Cic. *de nat. deor.* iii, 30, § 74; *II. Verr.* ii, 12, § 31.

<sup>1</sup> After *si* Hu. interpolates *furti uel ope consilio facti*. But they are unnecessary; the accomplice was in law as much a thief as the actual agent (iii, 202); the action competent in either case went by the name of *actio furti*.



[*nam si cum eo*]<sup>2</sup> agatur formula ita concipitur: IVDEX ESTO. SI PARET [*A DIONE HERMAEI FILIO (aut SI PARET OPE)*]<sup>3</sup> CONSILIOVE DIONIS HERMAEI FILII)<sup>4</sup> FVRTVM FACTVM ESSE<sup>5</sup> PATERAE AVREAE, QVAM OB REM EVM, SI CIVIS ROMANVS ESSET, PRO FVRE DAMNVN DECIDERE<sup>6</sup> OPORTERET et reliqua; item si peregrinus furti agat, ciuitas ei Romana fingitur. similiter si ex lege Aquilia peregrinus damni iniuriae agat aut cum eo agatur, 38 ficta ciuitate Romana iudicium datur. Praeterea aliquando fingimus aduersarium nostrum capite deminutum non esse: nam si ex contractu nobis obligatus obligatae sit et capite deminutus deminutaue fuerit, uelut mulier per coemptionem,

thus: 'So and so be judge: should it appear that [*Dio, son of Hermaeus, has stolen, or that 'with the aid]* or counsel of Dio, son of Hermaeus, there has been stolen a golden cup, by reason whereof, were he a Roman citizen, he would have to make amends as a thief,' etc. In the same way a peregrin feigns citizenship when he is pursuer in the same action; and there is the same fiction if he be either pursuer or defender in an action on the Aquilian law for wrongful damage to property. 38 Further, we sometimes proceed upon a fiction that our opponent has not been *capite deminutus*. For if one who is indebted to us on a contract undergo *capitis deminutio*, a female say by coemption, or a male by adrogation, he ceases by the civil law

<sup>2</sup> Added by K. u. S.

<sup>3</sup> The addition is suggested by Gou. and adopted by K. u. S., though by both expressed in a greater number of words.

<sup>4</sup> The ms. has *er. meifilio*.

<sup>5</sup> Most eds. interpolate *Lucio Titio*. Of course there must have been a name in the formula, though Gai. has not thought it necessary to express it.

<sup>6</sup> Comp. Cic. *de nat. deor.* iii, 30, § 74; Fest. v. *Vindiciae* (Bruns, p. 273). Hu. (*Beitr.* p. 121), Ritschl, (*Rhein. Mus. f. Phil.*, 1861, p. 384), and Voigt (*Bedeutungswechsel*, p. 151), all point out that *damnum* in the XII Tables did not mean damage—*noxia* was the technical word for that, but the amends or pecuniary reparation a man was bound to make for wrong done.

Voigt is of opinion that the words *pro fure damnum decidere* mean 'to make amends as if he were the

thief,' and that they are appropriate only to the case of a counselling accomplice; in other words, that they cannot have been used in the ordinary formula of the *actio furti* against the actual offender. But there is no authority for this idea. The phrase, in all probability, was used originally in sacramental procedure against a thief,—*aio te pro fure damnum decidere oportere*. The penalty of *furtum manifestum*, according to the old law, was slavery; to avoid this the thief was allowed to compound (Vlp. in fr. 7, § 14, D. *de pact.* ii. 14); hence the action requiring him to pay the amount of his composition; and the phrase employed in it was retained by the praetors under the formular system.

§ 38. Comp. i, 162; ii, 98; iii, 84; iv 80; Vlp. in fr. 2, § 1, D. *de cap. min.* (iv, 5); § 3, I. *de adquis. per adrog.* (iii, 10).

masculus per adrogationem, desinit iure ciuili debere nobis nec directo intendi potest dare eum eamue oportere; sed ne in potestate eius sit ius nostrum corrumpere, introducta est contra eum eamue actio utilis<sup>1</sup> rescissa capitis deminutione, id est in qua fingitur capite deminutus deminutae non esse.

- 39 Partes autem formularum hae sunt: demonstratio, intentio,  
40 adiudicatio, condemnatio. Demonstratio est ea pars formulae quae — — —<sup>1</sup> ut demonstretur res de qua agitur, uelut haec pars formulae: QVOD AVLVS AGERIVS NVMERIO NEGIDIO HOMINEM VENDIDIT, item haec: QVOD AVLVS AGERIVS  
41 [APVD] NVMERIVM NEGIDIVM HOMINEM DEPOSVIT. Intentio est ea pars formulae qua actor desiderium suum concludit, uelut haec pars formulae: SI PARET NVMERIVM NEGIDIVM AVLO AGERIO SESTERTIVM X MILIA DARE OPORTERE; item haec: QVID-  
QVID PARET NVMERIVM NEGIDIVM AVLO AGERIO DARE FACERE [OPORTERE];<sup>1</sup> item haec: SI PARET HOMINEM<sup>2</sup> EX IVRE QVIRI-

to be our debtor, nor can we contend directly that he is bound to give us what he owed; but, to prevent it being in his power thus to defeat our right, we may have against him an *utilis actio*, the *capitis deminutio* being rescinded,—in other words, an action embodying the fiction that he has not been *capite deminutus*.

- 39 The clauses of a formula are these,—the demonstration, the  
40 intention, the adjudication, and the condemnation. The demonstration is that part of the formula which [*is inserted at the outset*] on purpose to show what is the matter in dispute; for example, thus: ‘Whereas Aulus Agerius sold a slave to Numerius Negidius;’ or thus: ‘Whereas Aulus Agerius  
41 deposited a slave with Numerius Negidius.’ The intention is the clause in which the pursuer embodies his demand; for example, thus: ‘Should it appear that Numerius Negidius ought to give ten thousand sesterces to Aulus Agerius;’ or, ‘Whatever it shall appear that Numerius Negidius ought to give to or do for Aulus Agerius;’ or, ‘Should it appear that the slave so and so belongs to Aulus Agerius in quiritarian

<sup>1</sup> See ii, 78, note 1.

§ 40. Comp. Paul. in *Collat.* ii, 6, §§ 1, 4, 5.

<sup>1</sup> The MS. has *p'cipuediunserit*, but the eighth, ninth, eleventh, and twelfth letters uncertain; M. (K. u. S. p. xxii) suggests *praecipit id quod geritur*; K. u. S. (footnote) *principio ideo ponitur*; Hu. and P. *ideo*

*inseritur*, the other letters, in the form of *praecipuae*, being introduced by them in § 39, after *formularum*.

§ 41. Comp. Cic. *pro Rosc. com.* iv, 11; *II. Verr.* ii, 12, § 31; *L. Rubria*, c. 20 (Bruns, p. 88).

<sup>1</sup> Added by all eds.

<sup>2</sup> After *hominem* Hu. interpolates

- 42 TIVM AVLI AGERII ESSE. Adiudicatio est ea pars formulae qua permittitur iudici rem alicui ex litigatoribus adiudicare, uelut si inter coheredes familiae erciscundae agatur, aut inter socios communi diuidundo, aut inter uicinos finium regundorum: *nam illic ita est: QVANTVM*<sup>1</sup> ADIVDICARI OPORTET,
- 43 IVDEX TITIO<sup>2</sup> ADIVDICATO. Condemnatio est ea pars formulae qua iudici condemnandi absoluendiue potestas permittitur, uelut haec pars formulae: IVDEX NVMERIVM NEGIDIVM AVLO AGERIO SESTERTIVM X MILIA CONDEMNA. SI NON PARET, ABSOLVE; item haec: IVDEX NVMERIVM NEGIDIVM AVLO AGERIO DVMTAXAT [*X MILIA*] CONDEMNA. SI NON PARET, ABSOLVITO; item haec: IVDEX NVMERIVM NEGIDIVM AVLO AGERIO CONDEMNATO et reliqua, ut non adiciatur DVMTAXAT [*X MILIA*].
- 44 Non tamen istae omnes partes simul<sup>1</sup> inueniuntur, sed<sup>2</sup>

- 42 right.' The adjudication is the clause whereby the judge is authorized to adjudicate a thing to one in particular of the litigants, as when co-heirs are suing for partition of an inheritance, or partners for division of their estate, or conterminous proprietors for settlement of boundaries; it runs thus: 'So much as ought to be adjudicated, do you, judge, adjudicate
- 43 to Titius.' The condemnation is the clause whereby the judge is empowered to condemn or absolve; as, for example: 'Do you, judge, condemn Numerius Negidius to Aulus Agerius in ten thousand sesterces; should it not so appear, absolve him;' or, 'Do you, judge, condemn Numerius Negidius to Aulus Agerius, but not beyond ten thousand sesterces; should it not so appear, absolve him;' or, 'Do you, judge, condemn Numerius Negidius to Aulus Agerius,' etc., without the
- 44 addition of 'but not beyond ten thousand sesterces.' Those

*Stichum*. But this seems unnecessary. Of course the thing vindicated had to be named, whether a slave or lands; but Gai. here, as elsewhere, contents himself with a skeleton style.

- § 42. Comp. Vlp. xix, 16; § 20, I. *de act.* (iv, 6); §§ 4-6, I. *de off. iud.* (iv, 17).

<sup>1</sup> So most eds.; the ms. has *q̄tam*.

<sup>2</sup> So the ms.; but Hu. reads *cui oportet (cuiō)*, which certainly seems more consistent with the nature of the action. P., assuming that *Titio* is an erroneous rendering by the copyist of the abbreviation *tt* of the original, substitutes *tantum*.

- § 43. Comp. §§ 47-52, 57, 68, 73; *lex Rubria*, c. 20 (Bruns, p. 88). The writer of the ms. seems to have become confused by the repetition of *X milia*; he omits the words twice where they should be, and inserts them once—after *condemnato*, deleted above—where they should not.

- § 44. This par. has been subjected to much interpolation at the hands of the eds., and, as it seems to me, more than necessary. Gai. says that the four parts of a formula were never found together; the eds., with exception of He., Hu., and perhaps K. u. S., dispute this, and hold that

^ Paul. ad Ulp. in Fr. 6, D. de R. V. l. 1.

quaedam<sup>2</sup> inueniuntur, quaedam non inueniuntur. certe intentio aliquando sola inuenitur, sicut in praeiudicialibus formulis, qualis est qua quaeritur aliquis libertus sit, uel quanta dos sit, et aliae conplures:<sup>3</sup> demonstratio autem et adiudicatio et condemnatio numquam solae inueniuntur, nihil enim omnino [*demonstratio*]<sup>4</sup> sine intentione uel condemnatione ualet; item condemnatio sine demonstratione uel intentione, uel adiudica[*tio sine demonstratione et inten*]tione<sup>5</sup> nullas uires habet: ob id numquam solae inueniuntur.

clauses, however, are not all found together in a formula; some are present, others not. Sometimes, indeed, the intention alone is found; this occurs in praejudiciary formulae such as that for determining whether an individual is or is not a freedman, what is the amount of a marriage portion, and various other questions. The demonstration, adjudication, and condemnation, however, never stand alone: for [*a demonstration*] is utterly useless apart from an intention or condemnation; a condemnation is equally inoperative apart from a demonstration or intention; and an adjudication [*is useless without a demonstration and intention*]. This is why they [*i.e.* the demonstration, adjudication, and condemnation] are never found by themselves.

the three divisory actions contained them all. I am inclined to think they contained only demonstration, intention, and adjudication.

Rudorff (*Edict.* p. 86) conjecturally constructs the formula of the *actio communi diuidundo* thus: *Iudex esto. Quod ille fundus illi et illi communis est, quam ob rem ille illum communi diuidundo provocauit, quantum ob eam rem alteri ab altero aut Titio adiudicari oportet, id iudex alteri aut Titio adiudicato, quodque alterum alteri ob eam rem dare facere praestare oportet ex fide bona, eius iudex alterum alteri condemna; si non paret absolue.* Here are (1) demonstration, (2) intention, (3) adjudication, (4) a second intention, and (5) condemnation; but it is because there are two actions conjoined in one formula,—a *iudicium diuisorium* and an *incerti conditio*, to which latter alone the second intention and the condemnation belong. The *conditio* was not a necessary adjunct of the divisory formula; if introduced at all, it was only where

simple division would not be equitable without some payment or concession on one side or other.

But I much doubt that it ever was so introduced; it appears to me pretty clear from the language of §§ 4–6, I. *de off. iud.* (iv, 17), that it was of the office of the judge, without being moved thereto by anything on the face of the pleadings, and simply as incident to the adjudication, to pronounce such order or condemnation, over and above his adjudication, as was necessary to do justice between the parties.

<sup>1</sup> After *simul* Hu. and P. interpolate in *omnibus formulis*.

<sup>2</sup> After *sed* Hu. interpolates *solae*; and after *quaedam* he adds *tantum*. K. u. S. leave a blank after *sed*, and (footnote) on the authority of M., propose to fill it with *abesse potest una aliaue; item solae*.

<sup>3</sup> Comp. iii, 123; Paul. v, 9, § 1.

<sup>4</sup> So K. u. S., Hu., and most eds.

<sup>5</sup> Bk. and K. u. S. have *sine demonstratione uel intentione*; P. *sine demonstratione et intentione et con-*



45 Sed eas quidem formulas in quibus de iure quaeritur in ius conceptas uocamus, quales sunt quibus intendimus nostrum esse aliquid ex iure Quiritium, aut nobis dari oportere, aut pro fure damnum [*decidi oportere; in*]<sup>1</sup> quibus iuris civilis  
 46 intentio est. ceteras uero in factum conceptas uocamus, id est in quibus nulla talis intentionis conceptio est, [*sed*] initio formulae nominato eo quod factum est, adiciuntur ea uerba per quae iudici damnandi absoluendique potestas datur; qualis est formula qua utitur patronus contra libertum qui eum contra edictum praetoris in ius uocauit:<sup>1</sup> nam in ea ita est: RECUPERATORES<sup>2</sup> SVNT. SI PARET ILLVM PATRONVM AB ILLO [*ILLIVS*] PATRONI<sup>3</sup> LIBERTO CONTRA EDICTVM PRAETORIS<sup>4</sup> IN IVS VOCATVM ESSE, RECUPERATORES ILLVM LIBERTVM ILLI PATRONO SESTERTIVM X MILIA CONDEMNATE. SI NON PARET, ABSOLVITE. ceterae quoque formulae quae sub titulo DE IN

45 We say of those formulae which raise a question of civil right that they are conceived *in ius*; such are those in which we contend that something is ours on quiritarian title, or that something ought to be given us, or that some one ought to make amends as a thief; in them our intention is founded  
 46 upon a rule of the *ius civile*. On the other hand we call those *in factum conceptae* which contain no such intention, but in which, after reference in the outset to what has occurred, words are introduced empowering the judge to condemn or absolve. The formula employed by a patron against a freedman who has summoned him in contravention of the edict is of this description, and is in these terms: 'So and so be recuperators. Should it appear that so and so, a patron, was summoned by so and so, a freedman of said patron, in contravention of the praetor's edict, do you, recuperators, condemn said freedman to said patron in ten thousand sesterces; should it not so appear, absolve him.' The other formulae set forth in the title of the edict '*de in ius uocando*'

*demnatione*. Hu. interpolates only *sine intentione*; but it is difficult to see how a demonstration could be dispensed with in a divisory action.

§ 45. Comp. §§ 41, 60.

<sup>1</sup> So all eds. Comp. § 37 and thereto note 6.

§ 46. Comp. § 60; § 12, I. *de act.* (iv, 6).

<sup>1</sup> Comp. §§ 183, 187; § 3, I. *de poena tem. lit.* (iv, 16).

<sup>2</sup> See § 105, note.

<sup>3</sup> The ms. has *patrono*; the *illius* is due to Hollweg, and adopted by Hu.

<sup>4</sup> The ms. has *illius praetoris*; but it was not the practice to name the author of any particular provision of the edict; and probably the *illius* here is the one that ought to have stood before *patroni*, as mentioned in last note.

IVS VOCANDO<sup>5</sup> propositae sunt in factum conceptae sunt, uelut aduersus eum qui in ius uocatus neque uenerit neque uindicem dederit; item contra eum qui ui exemerit eum qui in ius uocatur; et denique innumerabiles eius modi aliae formulae  
 47 in albo proponuntur. Sed ex quibusdam causis praetor et in ius et in factum conceptas formulas proponit, uelut depositi et commodati. illa enim formula quae ita concepta est: IVDEX ESTO. QVOD AVLVS AGERIVS APVD NVMERIVM NEGIDIVM MENSAM ARGENTEAM DEPOSVIT, QVA DE RE AGITVR, QVIDQVID OB EAM REM NVMERIVM NEGIDIVM AVLO AGERIO DARE FACERE OPORTET EX FIDE BONA, EIVS<sup>1</sup> IVDEX NVMERIVM NEGIDIVM AVLO AGERIO CONDEMNATO N. R.<sup>2</sup> SI NON PARET, ABSOLVITO, in ius

are also *in factum conceptae*; for example that against a person who, having been duly summoned, has neither appeared nor found a *uindex*, that against a person who has forcibly carried off another duly summoned in an action, and many others  
 47 that are set forth in the album. To meet certain cases the praetor has provided in the edict formulae both *in ius* and *in factum conceptae*, as in deposit and commodate. The formula conceived as follows is *in ius*: 'So and so be judge. Whereas Aulus Agerius deposited with Numerius Negidius the silver table in question, whatever it appears that on that account Numerius Negidius ought in good faith to give to or do for Aulus Agerius, in that, judge, condemn Numerius Negidius to Aulus Agerius, — —; should it not so appear, absolve

<sup>5</sup> Comp. tits. D. *si q. in ius uoc.*, etc. (ii, 5, 6, and 8); tit. C. *de in ius uoc.* (ii, 2).

§ 47. Comp. § 60. Many attempts have been made, but all unsuccessfully, to explain the reason of the double formula described in this par. The solution of the difficulty might be easier if we knew for certain what were the *quaedam causae* to which Gai. refers,—whether his *uelut* is to be taken as enumerative (which it sometimes is) or as merely indicative.

The par. is useful, however, as clearly displaying the distinction between an *intentio in ius concepta* and one in *factum concepta*. In the former the question for the *iudex* to determine was one of law, though of course involving inquiry into facts,—'is or is not the defender indebted to the pursuer under a con-

tract of deposit? and if so, in how much?' In the latter the question was purely one of fact,—'was the thing deposited, and has the depositary dolefully failed to restore it? If so, condemn him in its value.'

<sup>1</sup> The ms. has *eius id iudex*; and some eds. so read the passage, referring *eius* to the preceding *ex fide bona*. The syntax, however, is *eius* (i.e. *nomine*) *condemna*, and *id* must be deleted.

<sup>2</sup> Hu. (*Studien*, p. 316) interprets these letters as *nisi restituat*, on the strength of a passage of Vlpian's (fr. 1, § 21, D. *depositi*, xvi, 3), where he says that, in the particular case he is referring to, the defender in an *a. depositi* would be condemned if he did not give up the thing deposited,—*nisi restituat*. But this affords no proof that the words were inserted in the *formula*; acquittal

concepta est: at illa formula quae ita concepta est: IVDIX ESTO. SI PARET AVLVM AGERIVM APVD NVMERIVM NEGIDIVM MENSAM ARGENTEAM DEPOSVISSE, EAMQVE DOLO MALO NVMERII NEGIDII AVLO AGERIO REDDITAM NON ESSE, QVANTI EA RES ERIT,<sup>3</sup> TANTAM PECVNIAM IVDIX NVMERIVM NEGIDIVM AVLO AGERIO CONDEMNATO. SI NON PARET, ABSOLVITO, in factum concepta est. similes etiam commodati formulae sunt.

- 48 Omnium autem formularum quae condemnationem habent ad pecuniariam aestimationem condemnatio *nunc*<sup>1</sup> concepta est: itaque et si corpus aliquod petamus, ueluti fundum hominem  
 x uestem [*aurum*] argentum,<sup>2</sup> iudex non ipsam rem condemnat *eum cum quo actum est*, sicut olim fieri solebat,<sup>3</sup> [*sed*] aestimata  
 49 re pecuniam eum condemnat. Condemnatio autem uel  
 50 certae pecuniae in formula proponitur uel incertae. cer-

him.' When framed in the following terms the formula is *in factum*: 'So and so be judge. Should it appear that Aulus Agerius deposited with Numerius Negidius a silver table, and that, through dole on the part of Numerius Negidius, it has not been returned to Aulus Agerius, then, judge, whatever be the value of the table, in that sum condemn Numerius Negidius to Aulus Agerius; should it not so appear, absolve him.' The formulae in commodate are in similar terms.

- 48 In formulae containing a condemnatory clause the actual condemnation is always in a money estimate; and even if our claim be for some *corpus*,—land, a slave, a garment, *gold*, silver, the judge does not condemn the defender in the thing itself, as used to be done under the older system, but,  
 49 having put a value upon it, condemns him in money. The clause of condemnation may either fix a certain sum of money  
 50 or leave it uncertain. A certain sum is named when the

in the event of restitution must have been implied in the *bona fides* of the *iudicium*, and was enjoined directly by the rule *omnia iudicia absolutoria sunt* (§ 114).

<sup>3</sup> Comp. fr. 179, fr. 193, D. *de V. S.* (l. 16). While in the *actio in factum* the condemnation was to be in the actual value (or in some cases twice the value, fr. 1, § 1, D. *depositi*) of the thing not returned, in that *in ius* it was to be in the *interesse*,—the damage sustained by the depositor.

§§ 48-60. Comp. §§ 32-35, tit. I. *DE ACTIONIBVS* (iv. 6).

§ 48. Comp. § 32, tit. I. *afid.*

<sup>1</sup> So P. renders the *n* of the ms., overlooked by other eds.

<sup>2</sup> The ms. has *argumentum*; but the enumeration we have here is so frequent (comp. ii, §§ 13, 20) as to leave no doubt as to its meaning, or as to the propriety of interpolating *aurum*.

<sup>3</sup> Under the procedure *sacramento*; it had to be followed by an *arbitrium litis aestimandae*, for converting the condemnation into money.

x See *Minchin's Roman Law* 203 (12) 6

- tae pecuniae *uelut* in ea formula qua certam pecuniam petimus; nam illic ima parte formulae ita est: IVDIX NVMERIVM NEGIDIVM AVLO AGERIO SESTERTIVM X MILIA CONDEMNNA. SI NON PARET, ABSOLVE. incertae uero condempnatio pecuniae duplicem significationem habet: est enim una *quidem cum*<sup>1</sup> aliqua praefinitione, quae uulgo dicitur cum taxatione, uelut si incertum aliquid petamus; *nam illic ima parte* formulae ita est: IVDIX NVMERIVM NEGIDIVM AVLO AGERIO DVMTAXAT SESTERTIVM X MILIA CONDEMNNA. SI NON PARET, ABSOLVE: uel incerta est et *infinita condemnatio*,<sup>2</sup> *uelut* si rem aliquam a possidente nostram esse petamus, id est si in rem agamus uel ad exhibendum; nam illic ita est: QVANTI EA RES ERIT, TANTAM PECVNIAM, IVDIX, NVMERIVM NEGIDIVM [AVLO AGERIO] CONDEMNNA. SI NON PARET, ABSOLVE. *Quid ergo est?*<sup>1</sup> iudex, si condemnet, certam pecuniam condemnare debet, etsi certa pecunia in condemnatione posita non sit. Debet autem iudex attendere, *ut*

- formula is one in which a definite sum is claimed; in such a case the final clause runs thus: 'Do you, judge, condemn Numerius Negidius to Aulus Agerius in ten thousand sesterces; should it not so appear, absolve him.' A clause of condemnation in an uncertain amount may mean either of two things. It may mean one in which there is a sort of anticipatory limitation, commonly called taxation, following on an illiquid claim; and then the final clause of the formula is as follows: 'Do you, judge, condemn Numerius Negidius to Aulus Agerius in not more than ten thousand sesterces; should it not so appear, absolve him.' Or it may mean one altogether uncertain and unlimited, as when we claim a thing from the party in possession of it on the averment that it is ours, in other words, when our action is *in rem* or *ad exhibendum*; then it runs: 'Whatever be the value of the thing, do you, judge, condemn Numerius Negidius to Aulus Agerius in that amount; should it not so appear, absolve him.'
- What does all this come to? That a judge, if he condemn, must do so in a definite sum of money, even though no definite sum be mentioned in the clause of condemnation.

<sup>1</sup> So Bk.; the ms. has *quae*, but with an interlinear substitution of *c* for the final *e*. K. u. S. and Hu. have simply *una cum*; P. *una quacum*.

<sup>2</sup> So I interpret the letter *c* in ms.

§ 52. Comp. § 32, tit. I. afd.

<sup>1</sup> So K. u. S. and Hu., but very doubtful. The reading proposed by Hu. in his earlier editions,—*Qui de re uero est iudex*, comes quite as close to the ms.



cum certae pecuniae condemnatio posita sit, neque maioris neque minoris summa posita condemnet, alioquin litem suam facit;<sup>2</sup> item si taxatio posita sit, ne pluris condemnet quam taxatum sit, alias enim similiter litem suam facit:<sup>2</sup> minoris autem damnare ei permissum est. at si etiam — — — —.

52a — — — — —.

53 Si quis intentione plus complexus fuerit (*causa cadit*),<sup>1</sup> id est rem perdit, nec a praetore in integrum restituitur, praeterquam quibusdam casibus in quibus — — — — —.<sup>2</sup> (*Plus autem quattuor*) modis petitur: re, tempore, loco, causa. (*re, ueluti si quis pro X*) milibus quae ei debentur xx milia

But he must take care that, when a definite sum is mentioned in it, he does not condemn in either a larger or smaller sum, otherwise he makes the cause his own; if the condemnation be taxed, and he condemn in more than the maximum, he runs the same risk; but he may lawfully condemn in less.

52a — — — — —. [52a] — — — — —.

53 If a pursuer have claimed in his intention more than he is entitled to, he fails in his suit, that is to say, he loses his claim altogether, nor can he be reinstated by the praetor except in those few cases in which — — — — —. *Too much may be claimed in four ways*,—in respect of amount, time, place, or circumstances. *There is over-claim in respect of amount*

<sup>2</sup> Comp. pr. I. *de obl. q. quasi ex del.* (iv. 5). 'A judgment that did not correspond to the formula had none of that efficacy which the praetor guaranteed to one that was within its terms. According to the Roman system of procedure the pursuer was in such a case destitute of any remedy against the defender; for, after judgment had been pronounced, it was impossible for the judge to rectify it, and a fresh action against the defender was inadmissible. Under these circumstances the judge himself, instead of the defender, was declared responsible to the pursuer, who had thus been deprived of his remedy,' Ihering, *G. d. R. R.* ii, p. 75, note.

§ 52a. P. 206 of the ms. is to a great extent illegible. The first seven lines are thus conjecturally rendered by Hu.—at si etiam *taxatio posita non sit, quanti uelit condemnare potest.* [52a] *Vnde, quia quod petit, qui formulam accipit intendere de-*

*bet, nec amplius index quam certa condemnatione constringitur, sed nec iterum eandem formulam accipit qui egit, et in condemnatione certam pecuniam quam petit ponere debet; ne consequatur minus quam uelit.*

§ 53. Comp. Paul. i, 10, § 1 (and in *Consult.* v, 4); § 33, tit. I. *afd.*, from which the words in ital., illegible in the ms., are supplied.

<sup>1</sup> *Causa cadere, lite cadere, formula cadere, formula excidere*, though sometimes used more generally, yet in strictness meant to fail through some mistake of form or procedure, rather than on the merits; see Cic. *de Inu.* ii, 19, § 57; Quintil. *Inst. Or.* iii, 6, § 69.

<sup>2</sup> Three lines illegible, with the single exception of the word *patitur*. Hu. proposes—in quibus omnes actores praetor non patitur ob errorem suum damno affici; nam minoribus XXV annorum semper ut in aliis causis et hic succurrit. Comp. § 33, tit. I. *afd.*

petierit, aut si (*is cuius*) ex parte res est totam eam aut maiore ex parte (*suam*) esse intenderit. (*tempore, ueluti si quis ante (diem uel) ante (condicionem petierit. loco, ueluti si quod (certo loco) dari promissum est, id (alio loco sine commemora- (tio)ne eius loci petatur, ueluti si (quis ita stipulatus fuerit : (EPHESI) DARE SPONDES? deinde Romae pure (intendat dari (sibi oportere). — — — — —*<sup>3</sup> petere, id est non adiecto loco. causa plus petitur uelut si quis in intentione tollat electionem debitoris quam is<sup>4</sup> habet obligationis iure, uelut si quis ita stipulatus sit: SESTERTIVM X MILIA AVT HOMINEM STICHVM DARE SPONDES? deinde alterutrum<sup>5</sup> ex his petat; nam quamvis petat quod minus est, plus tamen petere uidetur, quia potest aduersarius interdum facilius id praestare quod non petitur. similiter si quis genus stipulatus sit, deinde

*when, instead of ten thousand sesterces which are due to him, a man claims twenty thousand; or when, owing an equal share of a thing, he avers that the whole or the greater part is his. There is over-claim in point of time when he sues before the day of payment or the fulfilment of a condition. There is over-claim in respect of place when what it has been promised shall be paid at a certain place is sued for elsewhere without mention of that place; as when a person who has stipulated thus: 'Do you engage to pay at Ephesus?' afterwards sues in Rome, contending, without any qualification, that the money ought to be paid to him. — — — — —*  
 — —. There is over-claim in respect of circumstances when a pursuer in his intention deprives his debtor of an election to which he is entitled by the terms of the obligation. Suppose a man has acquired a claim under a stipulation conceived in such terms as: 'Do you engage to give me ten thousand sesterces or the slave Stichus?' if he thereupon sue for one in particular of these alternatives, although it be that of least value, still he is claiming more than he is entitled to; for it may be that it would be easier for the defender to give that which is not sued for. So if a man who has stipulated generically sues specifically, as when, having stipulated in

<sup>3</sup> Four lines illegible, with the exception of *dare mihi oportere* (consecutively). To utilise them Hu. alters the reading given above (from the Inst.) in this way—uelut si a te stipulatus sim: 'X milia sestertium dare spondes?' and proceeds—deinde uero Romae pure hoc modo intendam: si paret te sester-

tium X milia ex stipulatu dare mihi oportere; plus enim petere ideo intellegor, quia utilitatem promissori adimo, quam si Ephesi daret habiturus esset. Ephesi tamen etiam pure potero petere, id est, etc.

<sup>4</sup> The ms. has *quamvis*.

<sup>5</sup> So the Inst.; the ms. has *alterutrum eorum*; Hu. *alterutrum solum*.

speciem petat, uelut si quis purpuram stipulatus sit generaliter, deinde Tyriam specialiter petat; quin etiam licet uilissimam petat, idem iuris est propter eam rationem quam proxime diximus. idem iuris est si quis generaliter hominem stipulatus sit, deinde nominatim aliquem petat uelut Stichum, quamuis uilissimum. itaque sicut ipsa stipulatio concepta est,  
 54 ita et intentio formulae concipi debet. Illud satis apparet in incertis formulis plus peti non posse, quia cum certa quantitas non petatur, sed QUIDQVID aduersarium DARE FACERE OPORTERET intendatur, nemo potest plus intendere. idem iuris est et si in rem incertae partis actio data sit, uelut talis: QVANTAM PARTEM PARET IN EO FVND0, QVO DE AGITVR, actoris ESSE: quod genus actionis in paucissimis causis dari  
 55 solet. Item palam est si quis aliud pro alio intenderit nihil eum periclitari, eumque ex integro agere posse, quia *nihil ante uidetur egisse; ueluti si* is qui hominem Stichum petere deberet Erotem petierit, aut si quis ex testamento dari sibi oportere

general terms for purple, he specifically claims that of Tyre; nay, even although he were to claim specifically the poorest of purples, still, for the reason already stated, he would be demanding too much. And the same is the case when a man, having stipulated generally for a slave, sues for one in particular by name, say Stichus, no matter how worthless he may be. The intention therefore of the formula must be conceived in exactly the same terms as the stipulation that is  
 54 sued upon. In uncertain formulae, as is clear enough, there can be no excess of claim; for as no definite sum is sued for, but simply 'whatever' his adversary 'ought to give or do,' no pursuer can possibly frame his intention beyond that. The same observation applies to the case of an *actio in rem* in reference to an uncertain share; for example, 'whatever share of the land in question appears to belong' to the pursuer; but an action of this sort is very seldom  
 55 granted. It is equally clear that a man who in his intention has named one thing instead of another, runs no risk, and may proceed anew, being regarded as if he had not yet sued at all; as when he who ought to have claimed the slave Stichus has actually sued for Eros, or when one whose claim is really upon a stipulation has averred in his intention that

§ 54. In the first *intentio* in this par. Hu. substitutes *oportere pareat* for *oportet*; but that the latter was quite regular appears from the *for-*

*mula in ius* recited in § 47, and its repetition in § 60.  
 § 55. Comp. § 35, tit. I. afd.; Th. iv, 6, § 35.

intenderit cui ex stipulatu debebatur, aut si cognitor aut procu-  
 56 rator<sup>1</sup> intenderit sibi dari oportere. Sed plus quidem inten-  
 dere sicut supra diximus periculosum est; minus autem inten-  
 dere licet; sed de reliquo intra eiusdem praeturam agere non  
 permittitur: nam qui ita agit per exceptionem excluditur, quae  
 57 exceptio appellatur litis diuiduae.<sup>1</sup> At si in condemnatio-  
 ne plus petitum sit quam oportet, actoris quidem<sup>1</sup> periculum  
 nullum est; sed [*reus, cum*]<sup>2</sup> iniquam formulam acceperit, in  
 integrum restituitur ut minuatur condemnatio: si uero minus  
 positum fuerit quam oportet, hoc solum [*actor*]<sup>2</sup> consequitur  
 quod posuit; nam tota quidem res in iudicium deducitur,  
 constringitur autem condemnationis fine, quam iudex egredi  
 non potest. nec ex ea parte praetor in integrum restituit:  
 facilius enim reis praetor succurrit quam actoribus: loquimur  
 autem exceptis minoribus XXV annorum; nam huius aetatis  
 58 hominibus in omnibus rebus lapsis praetor succurrit. Si

the defender ought to give him something due under a testa-  
 ment, or when one who is only a cognitor or procurator has  
 contended that the defender was bound to pay [not to his  
 56 principal but] to him. To claim too much in the intention,  
 as already observed, is hazardous; but it is quite allowable  
 to claim too little. Action for the remainder, however, is not  
 permitted within the same praetorship; if raised sooner, it  
 will be barred by an exception of *lis diuidua*, divided suit.  
 57 If a greater sum than ought to be is named in the clause of  
 condemnation, the pursuer does not thereby incur any risk;  
 but the defender, on account of the unfairness of the formula,  
 will be reinstated by the praetor in order to have the con-  
 demnation reduced. If, on the other hand, a smaller sum be  
 mentioned in this clause than ought to have been, the pursuer  
 can get no more than is so mentioned; his whole claim has  
 been submitted to the arbitrament of the judge, but the  
 formula is controlled by the last clause of it, beyond which  
 the judge is not allowed to travel. Nor is there here any  
 room for his reinstatement by the praetor, who is always  
 much readier to lend assistance to a defender than to a pur-  
 suer: unless indeed the latter be under twenty-five years of  
 age; for the praetor will always interfere in aid of a minor,  
 58 in any case in which he may have been prejudiced. If too

<sup>1</sup> Comp. § 86.

§ 56. Comp. § 34, tit. I. afd.

<sup>1</sup> Comp. § 122; § 34, tit. I. afd.

§ 57. Comp. § 43.

<sup>1</sup> So G. and all eds.; ms. has *qa*.<sup>2</sup> Added by G. and adopted by  
most eds.

§ 58. Comp. § 40.



in demonstratione plus aut minus positum sit, nihil in iudicium deducitur, et ideo res in integro manet: et hoc est  
 59 quod dicitur falsa demonstratione rem non perimi. Sed sunt qui putant minus recte comprehendere, ut qui forte Stichum et Erotem emerit recte uideatur ita demonstrare: QVOD EGO DE TE HOMINEM EROTEM EMI, et si uelit de Stichum alia formula<sup>1</sup> agat, quia uerum est eum qui duos emerit singulos quoque emisse: idque ita maxime *Labeoni*<sup>2</sup> uisum est: sed si is qui unum emerit de duobus egerit, falsum demonstrat. idem et  
 60 in aliis actionibus est, uelut commodati et depositi. Sed nos apud quosdam scriptum inuenimus, in actione depositi, et denique in ceteris omnibus ex quibus damnatus unusquisque ignominia notatur,<sup>1</sup> eum qui plus quam oporteret demonstrauerit litem perdere, ueluti si quis una re deposita duas pluresue [*se de*]posuisse demonstrauerit, aut si is cui pugno mala percussa est, in actione iniuriarum etiam aliam

much or too little be condescended on in the demonstration, there is nothing really submitted to the judge, and the pursuer's claim remains intact; this is what is meant by the saying that a claim is not extinguished by an erroneous  
 59 demonstration. Some lawyers, among whom Labeo is pre-eminent, think that to found in it on less than is due is quite regular,—that if, for example, a man has purchased Stichus and Eros, he may quite correctly say in his demonstration, ‘Whereas I bought from you the slave Eros,’ and may if he likes have a separate formula applicable to Stichus, the fact being indisputable that he who has bought two slaves has bought each of them; but that if a man who has bought only one, mention two in his action, he demonstrates falsely. And they apply the same principles to other actions, such as those  
 60 of commodate and deposit. But we have read in the pages of some of the jurists, in reference to the action of deposit and those actions generally in which condemnation entails infamy, that he who in his demonstration has condescended on more than he ought to have done, loses his claim; as when a man who has deposited only one thing states in his demonstration that he has deposited two or more, or when one who has had a blow from the fist on his face, avers in an *actio*

§ 59. Comp. Vlp. in fr. 33, D. *de act. empt.* (xix, 1).

<sup>1</sup> After this word the ms. has *id*, which Hu. renders *iterum*, and P., omitting *alia formula*, *idem*.

<sup>2</sup> The ms. has *laticoni*. See i, 196, note 1.

§ 60. <sup>1</sup> An enumeration of those actions in § 182.

partem corporis percussam sibi demonstrauerit:<sup>2</sup> quod an debeamus credere uerius esse, diligentius requiremus. certe cum duae sint depositi formulae, alia in ius concepta, alia in factum, sicut supra quoque notauimus,<sup>3</sup> et in ea quidem formula quae in ius concepta est initio res de qua agitur demonstratorio modo<sup>4</sup> designetur, deinde inferatur iuris contentio his uerbis: QUIDQVID OB EAM REM ILLVM ILLI DARE FACERE OPORTET; in ea uero quae in factum concepta est, *statim initio intentionis* alio modo res de qua agitur designetur his uerbis: SI PARET ILLVM APVD [ILLVM REM]<sup>5</sup> ILLAM DEPOSUISSE, dubitare non debemus quin si quis in formula quae in factum composita est plures res designauerit quam deposuerit, litem perdat, quia in intentione plus *posuisse* (*uidetur*).<sup>6</sup>

60a — — — — — [61] — — — — —

*iniuriarum* that he has been struck on some other part of his body. Let us examine the matter to see whether this be the true view of it. As we have already observed, there are two formulae applicable to the case of deposit,—one *in ius*, and the other *in factum concepta*. In that which is *in ius concepta* the matter of dispute is first set forth in a demonstratory manner, and then the pursuer's contention in point of law is inferentially stated in the words, 'whatever in respect thereof so and so ought to give to or do for so and so;' in that *in factum concepta*, on the other hand, the matter of dispute is described *in the first part of the intention* in a different way, in these words: 'Should it appear that so and so deposited such and such a thing with so and so.' There is no room to doubt that if a person using this formula *in factum concepta* has described in it more things than he actually deposited, he loses his action, because he has put too much in his intention.

60a — — — — — [61] — — — — — that,

<sup>2</sup> The offence was more or less aggravated according to the part struck, etc.; see iii, 225, and § 9, I. *de iniur.* (iv, 4).

<sup>3</sup> See § 47.

<sup>4</sup> So the ms. quite distinctly; Hu. substitutes *demonstretur*, *id est modo*.

<sup>5</sup> Added by Hu., and generally accepted.

<sup>6</sup> The last word is supplied con-

jecturally by G. Whether the par. should end here is extremely doubtful; pp. 210, 211 of the ms. are entirely illegible, therefore we have no means of knowing.

§§ 60a–68. Comp. §§ 36–40, I. *DE ACTIONIBVS* (iv, 6).

§ 60a. It is generally assumed that on pp. 210, 211, Gai. dealt with the same matters as are referred to in §§ 36–39, tit. I. *afd.*

- 61 continetur ut habita ratione eius quod inuicem actorem ex  
 eadem causa praestare oporteret, in reliquum eum cum quo  
 62 actum est condemnare. Sunt autem bonae fidei iudicia  
 haec: ex empto uendito, locato conducto, negotiorum gestorum,  
 mandati, depositi, fiduciae, pro socio, tutelae, [*rei uxoriae*,  
 63 [*commodati, pigneraticium, familiae erciscundae, communi*  
 [*diuidundo*],] *praescriptis uerbis*. (*In his*)<sup>1</sup> tamen iudici nul-  
 lam omnino inuicem compensationis rationem habere — —<sup>2</sup>  
 formulae uerbis praecipitur; sed quia id bonae fidei iudicio  
 conueniens uidetur, *ideo*<sup>3</sup> officio eius contineri creditur.
- 64 Alia causa est illius actionis qua argentarius experitur: nam  
 is cogitur cum compensatione agere, *et ea* compensatio uerbis  
 formulae exprimitur, *adeo quidem ut itaque*<sup>1</sup> ab initio compen-  
 satione facta minus intendat sibi dari oportere: ecce enim si

- 61 account being taken of anything which the pursuer is bound  
 to pay on his side in respect of the same matter, the defender  
 62 is to be condemned only in the balance. The *bonae fidei*  
 actions are those arising out of purchase and sale, location  
 and conduction, unauthorized management of another's affairs,  
 mandate, deposit, fiduciary covenant upon a conveyance, part-  
 nership, tutory, *a woman's dowry, commodate, and the contract*  
*of pledge; together with those for partitioning an inheritance*  
*amongst the heirs and for dividing common property*, and that  
 63 *praescriptis uerbis*. There is nothing in the wording of the  
 formula in those actions that enjoins the judge thus to set off  
 claims between the parties; but as such a course is consonant  
 with the notion of a *bonae fidei iudicium*, it is held to be within  
 64 the scope of the judge's office. The rule is different in the  
 case of the action made use of by a banker. He is required  
 to set off his customer's counter-claim, and this is stated in  
 the formula in so many words, so that here, from the very  
 first, the averment in the intention is that the defender is  
 bound to pay less than the nominal amount of his debt; for

§ 61. Comp. § 39, tit. I. afd., to the  
 latter half of which the legible por-  
 tion of this par. (on p. 212) corre-  
 sponds. Comp. also Paul. ii, 5,  
 § 3. X

§ 62. Comp. § 28, tit. I. afd., from  
 which the words in ital. are sup-  
 plied, (the *a. rei uxoriae* being in-  
 troduced on the suggestion of § 29).  
 Comp. also Cic. *Top.* xvii, 66.

§ 63. K. u. S. think this par. corrupt,  
 and that it should run—*In his*  
*tamen iudici nulla omnino parte*

*inuicem compensationis rationem*,  
 etc.

<sup>1</sup> So K. u. S.; Hu. proposes  
*uerum*. But there is no space in  
 the ms. between *uerbis* in last par.  
 and *tamen* in this.

<sup>2</sup> The letters in the ms. seem to  
 be *ntrartae*, which K u. S. read  
*diserte*.

<sup>3</sup> The ms. has *id*.

§ 64. Comp. § 68.

<sup>1</sup> K. u. S. delete *itaque*; Hu.  
 and P. substitute *statim*.

\* By a rescript of Marc. Aurelius compensation was  
 allowed to be pleaded in answer to stricti iuris  
 actions under cover of an *exceptio doli* § 39, tit. I.  
 afd., this rescript may have been published before  
 Gaius wrote yet not have come to his knowledge

- sestertium x milia debeat Titio, atque ei xx debeantur, sic intendit: SI PARET TITIVM SIBI X MILIA DARE OPORTERE AMPLIVS  
 65 QVAM IPSE TITIO DEBET. Item bonorum emptor cum deductione agere iubetur, *id est ut* in hoc solum aduersarius eius condemnetur quod superest, deducto eo quod inuicem ei  
 66 bonorum emptor defraudatoris nomine debet. Inter compensationem autem quae argentario opponitur, et deductionem quae obicitur bonorum emptori, illa differentia est, quod in compensationem hoc solum uocatur quod eiusdem generis et naturae est; ueluti pecunia cum pecunia compensatur, triticum cum tritico, uinum cum uino, adeo ut quibusdam placeat non omni modo uinum cum uino aut triticum cum tritico compensandum, sed ita si eiusdem naturae qualitatisque sit; in deductionem autem uocatur et quod non est eiusdem generis; itaque si<sup>1</sup> pecuniam petat bonorum emptor et inuicem frumentum aut uinum is debeat, deducto<sup>2</sup> quanti id erit, in reli-

example, if the banker be due Titius ten thousand sesterces, and the latter be due the banker twenty thousand, he words his intention thus: 'If it appear that Titius ought to pay him ten thousand sesterces more than he himself is due to Titius.'

- 65 The purchaser too of a bankrupt's estate, when proceeding against one of its debtors, is required to sue *cum deductione*; in other words, the defender is to be condemned only in so much as still remains due after deducting anything owing to  
 66 him by the pursuer as representing the bankrupt. There is this difference, however, between the compensation pleadable against a banker and the deduction required of the purchaser of a bankrupt's estate, that only things of the same sort can be set off one against the other,—money against money, wheat against wheat, wine against wine, some even going so far as to hold that wine cannot in every case be compensated with wine, or wheat with wheat, but only when of the same variety and quality; but that may be made a matter of deduction which is not of the same sort, so that if the purchaser of a bankrupt's estate claim money, and he on his side be due corn or wine, the value of the latter is deducted, and

§ 65. Comp. iii, 81.

§ 66. Comp. Paul. ii, 5, § 3.

<sup>1</sup> After *si* is *u*, with a small *o* superscribed, — the ordinary contraction of *uero*. This leads K. u. S. (footnote) to surmise that something like the following has been omitted: itaque *si frumentum aut uinum petat bonorum emptor et inuicem*

*defraudatoris nomine pecuniam is debeat, quanto amplius ea pecunia id frumentum aut uinum erit, in condemnatione ponitur; si uero, etc.*

<sup>2</sup> After *deducto* the MS. has something like *fore*, which induces Hu. to read *deducta ea re*, and P. *deducto a bonorum emptore*.



67 quum experitur. Item uocatur in deductionem et id quod  
in diem debetur; compensatur autem hoc solum quod prae-  
68 senti debetur. Praeterea compensationis quidem ratio in  
intentione ponitur; quo fit ut si facta compensatione plus  
nummo uno intendat argentarius, causa cadat<sup>1</sup> et ob id rem  
perdat: deductio uero ad condemnationem ponitur, quo loco  
plus petenti periculum non interuenit; utique bonorum em-  
ptore agente, qui licet de certa pecunia agat, incerti tamen  
condemnationem concipit.

69 Quia tamen superius<sup>1</sup> mentionem habuimus de actione  
qua in peculium filiorumfamilias seruorumque *agitur*, opus  
est ut de hac actione, et de ceteris quae eorumdem nomine  
in parentes dominosue dari solent, diligentius admoneamus.  
70 Inprimis itaque si iussu patris dominiue negotium gestum  
erit, in solidum praetor actionem in patrem dominumue  
comparauit: et recte, quia qui ita negotium gerit, magis patris

67 he obtains only the balance. Further, while a debt with a  
postponed term of payment may be a matter of deduction,  
there can be set-off only of what is payable on the instant.

68 Besides, the amount of a set-off is stated in the intention, so  
that if a banker, after allowing compensation, condescends on  
a single sesterce too much, he fails in his suit, and thereby  
loses his claim; [matter of] deduction, however, is stated in  
the clause of condemnation, and the mention there of too  
large a sum does no harm, at least in the case of action by  
the purchaser of a bankrupt's estate, whose formula, though  
founding on a claim of definite amount, is yet framed with an  
indefinite condemnation.

69 Allusion has been made in a previous page to the action  
directed against the *peculium* of *filiifamilias* and slaves; we  
must now explain it more minutely, as well as those other  
actions that are granted against parents and owners on their  
70 account. In the first place then, if any transaction have  
been entered into on the order of father or owner, an action  
of praetorian introduction lies against such father or owner  
for the full amount of the debt incurred; and very properly,  
because the other party to such a transaction relies in it  
rather on the credit of the father or owner than on that of

§ 67. Comp. fr. 7, pr. D. *de compens.*  
(xvi, 2).

§ 68. Comp. §§ 53, 57.  
<sup>1</sup> Comp. § 53, note 1.

§§ 69-74. Comp. tit. I. *QVOD CVM EO*  
*QVI IN ALIENA POTESTATE EST*

*NEGOTIVM GESTVM ESSE DICITVR*  
(iv, 7).

§ 69. Comp. pr. tit. I. *afid.*

<sup>1</sup> In § 60a, *i.e.* in the course of the  
illegible pages 210 or 211 of the ms.

§ 70. Comp. § 1, tit. I. *afid.*

- 71 dominiue quam filii seruue fidem sequitur. Eadem ratione conparauit duas alias actiones, exercitoriam et institoriam:<sup>1</sup> tunc autem exercitoria locum habet cum pater dominusue filium seruumue magistrum naui praeposuerit, et quid cum eo eius rei gratia cui praepositus fuit [negotium]<sup>2</sup> gestum erit; cum enim ea quoque res ex uoluntate patris dominiue contrahi uideatur, aequissimum esse uisum est in solidum actionem dari: quin etiam, licet extraneum quisque magistrum naui praeposuerit, siue seruum siue liberum, tamen ea praetoria actio in eum redditur: ideo autem exercitoria actio appellatur, quia exercitor uocatur is ad quem cottidianus nauis quaestus peruenit. institoria uero formula tum locum habet cum quis tabernae aut cuilibet negotiationi filium seruumue aut quemlibet extraneum, siue seruum siue liberum, praeposuerit, et quid cum eo eius rei gratia cui praepositus est contractum fuerit: ideo autem institoria uocatur, quia qui tabernae praeponitur institor appellatur: quae et ipsa formula in solidum
- 72 est. Praeterea tributoria quoque actio in patrem domi-

- 71 the son or slave. On the same principle the praetor has devised two other actions, the exercitorian and institorian. The exercitorian comes into play when a father or owner has placed his son or slave in command of a vessel, and the latter has entered into some undertaking on the ship's account; as his contract in such a case is virtually authorized by his father or owner, it seemed in the highest degree equitable to grant [the other party] an action for the full amount. And what is more, even if it be a stranger, whether a freeman or a slave, that has been put in command of the vessel, this praetorian action will be allowed against the person who placed him there. It is called exercitorian, because *exercitor* is the name given to the individual who is drawing the daily profits of the ship. The institorian action is employed when a person has committed the management of a shop or business of any kind to his son or slave, or to some stranger, whether free or not, and some contract has been entered into by the latter on account of the shop or business entrusted to him; it is called institorian, because the individual placed in charge of a shop is spoken of as its *institor*. This action likewise is *in solidum*.
- 72 Besides these there is the tributorian action against a father

§ 71. Comp. § 2, tit. I. aff.; Paul. ii, tits. 6, 8.

<sup>1</sup> The ms. has throughout *insti-*  
*tutor* and *institutoria*, which K. u. S.

(footnote) remark is also the reading of the best mss. of the Inst.

<sup>2</sup> Seems to be a gloss.

§ 72. Comp. § 3, tit. I. aff. The end

numue constituta est cum filius seruusue *in peculiari* — — <sup>1</sup>  
 merce sciente patre dominoue negotietur; nam si quid eius  
 rei gratia cum eo contractum fuerit, ita praetor ius dicit, ut  
 73 quidquid in his mercibus — — — — —. [73] —

or owner, whose son or slave has with his father's or owner's  
 knowledge invested his *peculium* in merchandise; if in the  
 course of his trade he have entered into any contract, the rule  
 laid down by the praetor is, [that all the goods acquired by him  
 in course of business, and all the money made in it, shall be  
 divided between his father or owner and the other creditors, in  
 proportion to their respective claims. And as the father or  
 owner himself is allowed to make the distribution, if any of the  
 creditors complain that less than he was entitled to has been  
 apportioned to him, tributum, the praetor will accord him the  
 73 action that goes by the name of *tributorian*. There has also  
 been introduced the *actio de peculio et de in rem verso*, i.e.  
 in respect of a *peculium* and of what has been turned by a  
*filiusfamilias* or a slave to his father's or owner's profit; in  
 order that, although the child or slave may have contracted  
 without his father's or owner's consent, yet the latter shall  
 be made to pay in full for anything turned to his profit,  
 or, if there be nothing of that sort, that he shall be compelled  
 to pay to the extent of the child's or slave's *peculium*.  
 Everything is held to be turned to the father's or owner's profit  
 that has been necessarily expended by his son or slave on his  
 account; as when the latter has borrowed money and therewith  
 paid his father's or owner's creditors, or repaired buildings of  
 his which were becoming ruinous, or bought wheat for his  
 establishment, or even purchased for him land or any other  
 necessary. Accordingly, if, of say a thousand sesterces which  
 your son or slave has borrowed from Titius, he has paid five  
 hundred to a creditor of yours, but has spent the other five  
 hundred in some other way, you will be condemned for the first  
 five hundred in full, but as regards the rest only for so much  
 as is included in the *peculium*; whence it is apparent that,  
 the whole thousand sesterces have been expended to your profit,  
 the whole thousand may be recovered from you by Titius.  
 though it is in one and the same action that a claim is  
 both against the *peculium* and in respect of expenditure  
 that of

of the par. is on p. 215, and quite  
 illegible; but it probably corre-  
 sponded very closely to the reading  
 of the Inst. (which see).

<sup>1</sup> The ms. seems to have *optio*;  
 Hu. reads *cuiusvis pretii*; Gou.

suggests *forte*.

§ 73. Comp. §§ 4-4c, tit. *SE DICITVR*  
 ii, 9. What is said affd.  
 part of § 72 in the course of the  
 applies equally to 20 or 211 of the ms.  
 this one. tit. I. affd.

— — — — — deducitur quod patri dominoue quique in eius potestate sit a filio seruoue debetur, et quod superest hoc solum peculium esse intellegitur; aliquando tamen id quod ei debet filius seruusue qui in potestate patris dominiue sit non deducitur ex peculio, uelut si is cui debet in huius  
 74 ipsius peculio sit.<sup>1</sup> Ceterum dubium non est quin et is qui iussu patris dominiue contraxerit, cuique exercitoria uel institoria formula competit, de peculio aut de in rem uerso agere possit; sed nemo tam stultus erit, ut qui aliqua illarum actionum sine dubio solidum consequi possit, uel in difficultatem se deducat probandi habere peculium eum cum quo contraxerit exque eo peculio posse sibi satisfieri, uel id quod prosequi-  
 74atur in rem patris dominiue uersum esse. Is quoque cui tributoria actio competit de peculio uel de in rem uerso agere potest; sed huic sane plerumque expedit hac potius actione

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[*father's or owner's benefit, yet it embraces two distinct condemnations; and accordingly the judge before whom it is tried ought first to see whether anything has been turned to the father's or owner's profit, and not proceed to consider the amount of the peculium unless nothing, or at least something less than the whole, has been so expended. In proceeding to estimate the amount of the peculium, anything that may be*]  
 due by the son or slave to his father or owner, or any one in the *potestas* of these last, is first deducted, and only what remains is regarded as *peculium*. Sometimes, however, what is due by the son or slave to an individual in the *potestas* of his father or owner is not deducted; for instance, when such  
 74 individual is a slave belonging to the *peculium*. There is no doubt that he who has entered into a contract on the order of father or owner, as well as he to whom an exercitorian or institorian formula is competent, may sue by the *actio de peculio uel de in rem uerso*; but no one who could recover in full by one of the three first named actions would be so foolish as to encumber himself with the burden of proving that either the person with whom he had contracted possessed a *peculium*, and that there was enough in it to satisfy his claim, or that its outcome of the contract had been turned to the advantage of the father or owner. He also to whom the  
 72 Besidian is competent may sue *de peculio uel de in rem*  
 § 71. Comp. § d indeed it is more for his advantage to do so. For  
 tits. 6, 8.

<sup>1</sup> The MS. had a *seruus uicarius*,  
 tutor and institutus (ii, 20).

§ 74. Comp. § 5, tit. I. aff.  
 § 74a. Comp. § 5, tit. I. aff.



uti quam tributoria; nam in tributoria eius solius peculii ratio habetur quod in his mercibus est in quibus negotiatur filius seruusque quodque inde receptum erit, at in actione peculii, totius: et potest quisque tertia forte aut quarta uel etiam minore parte peculii negotiari, maximam uero partem peculii in aliis rebus habere; longe magis, si potest adprobari id quod [*dederit qui*]<sup>1</sup> contraxit in rem patris dominiue uersum esse, ad hanc actionem transire debet; nam, ut supra diximus,<sup>2</sup> eadem formula et de peculio et de in rem uerso agitur.

- 75 Ex maleficio filiorumfamilias seruorumque, ueluti si furtum fecerint aut iniuriam commiserint, noxales actiones proditae sunt, uti liceret patri dominiue aut litis aestimationem sufferre aut noxae<sup>1</sup> dedere: erat enim iniquum nequitiam eorum ultra ipsorum corpora parentibus dominisue damnosam  
76 esse. Constitutae sunt autem noxales actiones aut legibus

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in the tributorian account is taken only of so much of the *peculium* as has been converted into merchandise by the son or slave, with the profits thereof, while in that *de peculio* the whole of it is reckoned; and it may happen that only a third or a fourth or even a smaller part of the *peculium* has been expended on mercantile wares, the greater portion having been otherwise invested. Still more is it for the creditor's advantage to employ the action *de peculio* if he is in a position to prove that what *he gave his debtor under the contract* was converted to the uses of the latter's father or owner; for, as already said, it is by one and the same formula that a party sues *de peculio* and *de in rem uerso*.

- 75 In respect of the wrong-doing of *filiifamilias* and slaves, as when they have committed theft say, or personal injury, noxal actions have been provided, whereby the father or owner has the option either of submitting to pecuniary damages, or of surrendering the wrong-doer in reparation; for it was held unfair that parents or owners should be losers on account of the wickedness of those subject to them in  
76 more than the bodies of these last. Those noxal actions have been established either by enactment or by the praetorian

<sup>1</sup> Added by Hu.; K. u. S. interpolate *dederit is qui cum filio seruoue*.

<sup>2</sup> In § 73; comp. § 4, tit. I. afd.

§§ 75-78. Comp. tit. I. *DE NOXALIBVS*

*ACTIONIBVS* (iv, 8).

§ 75. Pr. § 2, tit. I. afd. Comp. i, 140; Paul. ii, 31, § 7.

<sup>1</sup> See § 1, tit. I. afd. and note.

§ 76. § 4, tit. I. afd.

aut edicto praetoris: legibus, uelut furti lege XII tabularum,<sup>1</sup> damni iniuriae *item*<sup>2</sup> lege Aquilia;<sup>3</sup> edicto praetoris, uelut  
 77 iniuriarum<sup>4</sup> et ui bonorum raptorum.<sup>5</sup> Omnes autem noxales actiones capita<sup>1</sup> sequuntur: nam si filius tuus seruusue noxam commiserit, quamdiu in tua potestate est tecum est actio; si in alterius potestatem peruenerit, cum illo incipit actio esse; si sui iuris coeperit esse, directa actio cum ipso est et noxae deditio extinguitur. ex diuerso quoque directa actio noxalis esse incipit: nam si paterfamilias noxam commiserit, et is se in adrogationem tibi dederit aut seruus tuus esse coeperit, [*quod*] quibusdam casibus accidere primo commentario<sup>2</sup> tradidimus, incipit tecum noxalis actio esse quae  
 78 ante directa fuit. Sed si filius patri aut seruus domino noxam commiserit, nulla actio nascitur: nulla enim omnino inter me et eum qui in potestate mea est obligatio nasci potest; ideoque et si in alienam potestatem peruenerit aut sui iuris

edict: by enactment, as in the case of theft, in accordance with the law of the Twelve Tables, and of wrongful damage to property, in accordance with the Aquilian law; by the edict of the praetor, as in personal injury and violent away-  
 77 taking of another's goods. Noxal actions invariably follow the wrong-doer. Therefore if your son or slave have committed an offence, action lies against you so long as he remains in your *potestas*; if he pass into that of another person, action begins to lie against the latter; if he become *sui iuris*, direct action begins to lie against himself, and noxal surrender is no longer demandable. Conversely an action which is in the first instance direct, may afterwards become noxal; for if a *paterfamilias* has committed a delict, and subsequently gives himself to you in arrogation or becomes your slave,—and this, as we have explained in our First Commentary, might happen occasionally,—the action which was originally direct begins  
 78 to be a noxal one against you. But if a child or slave have committed a delict against his father or owner, there is no action, obligation between me and an individual subject to my *potestas* being an impossibility; consequently, even though he pass into the *potestas* of a third party or become

<sup>1</sup> Comp. iii, §§ 189 f.<sup>2</sup> The ms. has *ū*.<sup>3</sup> Comp. iii, 210.<sup>4</sup> Comp. iii, 224.<sup>5</sup> Comp. iii, 209.

§ 77. § 5, tit. I. afd.

<sup>1</sup> So the ms.; most eds. make it *caput*.<sup>2</sup> See i, 160.

§ 78. Comp. § 6, tit. I. afd.

esse coeperit, neque cum ipso neque cum eo cuius nunc in potestate est agi potest. unde quaeritur, si alienus seruus filiusue noxam commiserit mihi, et is postea in mea esse coeperit potestate, utrum intercidat actio an quiescat: nostri praeceptores<sup>1</sup> intercidere putant, quia in eum casum deducta sit in quo *actio*<sup>2</sup> consistere non potuerit, ideoque licet exierit de mea potestate agere me non posse; diuersae scholae auctores<sup>1</sup> quamdiu in mea potestate sit quiescere actionem putant, quia ipse mecum agere non possim, cum uero exierit  
 79 de mea potestate tunc eam resuscitari. Cum autem filiusfamilias ex noxali causa mancipio datur, diuersae scholae auctores<sup>1</sup> putant ter eum mancipio dari debere, quia lege XII tabularum cautum sit [*ne aliter filius de potestate patris*]<sup>2</sup> exeat quam si ter fuerit mancipatus: Sabinus et Cassius ceterique nostrae scholae auctores<sup>1</sup> sufficere unam mancipationem crediderunt, *et illam*<sup>3</sup> ‘tres’ legis XII tabularum ad uoluntarias mancipationes pertinere.

*sui iuris*, I cannot proceed either against him or against the third party to whom he has become subject. Hence the question,—suppose another man’s slave or son has committed a delict against me, and has afterwards become subject to my *potestas*, is my right of action extinguished or merely suspended? The leaders of our school think that it is extinguished, matters having been brought into a position in which an action could not have arisen, and that therefore I cannot sue even though he should eventually pass out of my *potestas*; those of the other school are of opinion that my action is only suspended while the child or slave is in my *potestas*, because  
 79 I cannot proceed against myself, but that it revives on the potestal relationship coming to an end. The jurists of the other school are further of opinion that when a *filiusfamilias* is noxally mancipated there must be three mancipationes, in consequence of the provision in the Twelve Tables that a son is not released from his father’s *potestas* unless mancipated three times; but Sabinus and Cassius, and the other teachers of our school, hold one mancipation sufficient, being of opinion that the word ‘three’ in the Twelve Tables refers only to such mancipationes as are voluntary.

<sup>1</sup> See i, 196, note 1.

<sup>2</sup> According to Bl. the ms. has the usual contraction for *actio*; Stud. has doubts; K. u. S. omit the word; Hu. substitutes *initio*; P. *omnino*.

§ 79. Comp. i, §§ 132, 140, 141; also § 7, tit. I. affd.

<sup>1</sup> See i, 196, note 1.

<sup>2</sup> Added by G., and generally adopted.

<sup>3</sup> So the ms., *uocem* being under-

80 Haec ita de his personis quae in potestate [sunt], siue ex contractu siue *ex maleficio* earum nomine actio sit.<sup>1</sup> quod uero ad eas personas quae in manu mancipioe sunt ita ius dicitur, ut cum *ex aliquo actu*<sup>2</sup> earum<sup>3</sup> agatur, nisi ab eo cuius iuri subiectae sint *in solidum* defendantur, bona quae earum futura forent si *eius iuri* subiectae non essent *ueneant*: sed cum rescissa *capitis deminutione cum*<sup>4</sup> iis imperio continenti iudicio<sup>5</sup> agitur,<sup>6</sup> — — — — —.

80a — — — — —. [81] — — — — —

81 diximus, *quamquam* non permissum fuerit et mortuos homines

80 These rules apply in the case of individuals *in potestate*, whether the action [against those to whom they are subject] be in respect of a contract of theirs or of a delict. As regards those *in manu* or *in mancipio* the rule is that, if action be raised upon *any act* of theirs, unless they be defended *in solidum* by him to whom they are subject, the estate which would have been theirs but for their subjection will be put up to sale. If, however, they be proceeded against in a *iudicium imperio continens*, the *capitis deminutio* having been rescinded, — — — — —.

80a — — — — —. [81] — — — — —,

81 although it is not allowed to make a noxal surrender of dead

stood. K. u. S. read *et illas*; Hu. *etenim*, the *legis* being changed into *lege*.

§ 80. Comp. iii, 84; iv. 38. The par. is incomplete; p. 219 being illegible, with exception of the first word, *agitur*.

<sup>1</sup> The ms. has *inomisiaeēt*. K. u. S. leave the letters uninterpreted; Gou. suggests *in alios actio esset*; Hu., following Bk., *controuersia sit* (for *esset*); P. has *institutā actio est*. The nearest interpretation seems that I have given above, *sit* being substituted for *esset*, just as is *agatur* for the *ageretur* of the ms. two lines lower.

<sup>2</sup> The letters in the ms. are uncertain, but seem to be *exolliactu*. K. u. S. and Hu. read *ex contractu*. The traces seem to me nearer *ex aliq actu*, which includes both contract and delict; see fr. 2, § 5, D. *de reb. cred.* (xii, 1), fr. 225, D. *de V. S.* (l, 16). On the consequences of delict by *capite minuti* see fr. 2, § 3, D. *de cap. min.* (iv, 5).

<sup>3</sup> Probably the words *legitimo*

*iudicio* ought to be interpolated after *earum*.

<sup>4</sup> These three words not recognizable in the apparent *ipnp* of the ms.; but justified on reference to iii, 84.

<sup>5</sup> Comp. §§ 104, 105.

<sup>6</sup> Hu., referring to Vlp. xi, 27, thus completes the par.—*si aduersus eam actionem non defendantur, etiam cum ipsa muliere dum in manu est agi potest, quia tum tutoris auctoritas necessaria non est*. But this takes no account of persons *in mancipio*, though equally within the scope of Gaius' explanation.

§ 80a. The illegible page 219 is supposed to have contained an exposition of a man's liability for mischief done by an animal belonging to him, corresponding to tit. I. *SI QVADRVPE PAVPERIEM FECISSE DICITVR* (iv, 9); he had either to pay damages or noxally surrender it.

§ 81. More than half of the first line of p. 220 is uncertain, and as deciphered incomprehensible. One of the rules in regard to noxal actions

x And is used in the words of the edict fr. 2, § 1 D. *de cap. min.* (iv, 5.)



dedere, tamen etsi quis eum dederit qui fato suo uita excesserit aequè liberatur.

- 82 Nunc admonendi sumus agere nos aut nostro nomine aut alieno, ueluti cognitorio, procuratorio, tutorio, curatorio; cum olim, quo tempore legis actiones in usu fuissent, alieno nomine
- 83 agere non liceret<sup>1</sup> *praeterquam*<sup>2</sup> ex certis causis.<sup>3</sup> Cognitor autem certis uerbis in litem coram aduersario substituitur: nam actor ita cognitorem dat: QVOD EGO A TE uerbi gratia FVNDVM PETO, IN EAM REM LVCIVM TITIVM TIBI COGNITOREM DO; aduersarius ita: QVIA TV A ME FVNDVM PETIS, IN EAM [REM] TIBI PVBLIVM MEVIVM COGNITOREM DO. potest ut actor ita

men, yet if a defender have surrendered a slave that has succumbed to the common fate of humanity [*i.e.* has died a natural death], he is equally freed from his liability.

- 82 The next matter of observation is, that we may sue either in our own name or through an agent, such as a cognitor, procurator, tutor, or curator; whereas formerly, when the *legis actiones* were in use, it was unlawful, except in certain
- 83 cases, to sue in another person's name. A cognitor is made our substitute in a cause by certain formal words spoken in presence of the adversary; by the pursuer thus: 'Whereas I am claiming from you,' for example, 'such and such lands, I give you Lucius Titius as my cognitor in the matter;' and by the defender thus: 'As you are claiming from me such and such lands, I give you Publius Mevius as my cognitor in the matter.' Or the pursuer may say: 'Whereas I mean to

was, that if the offending slave or animal died before litiscontestation, the owner was no longer liable, fr. 39, § 4, D. *de nox. act.* (ix. 4), fr. 1, § 13, D. *si quadrup. paup.* (ix. 1); and this may have been stated in the text. But what if the death were after litiscontestation? Was it sufficient for the owner to give up the dead body? That question seems to have been answered in the negative; as Vlp. says in fr. 1, § 14, D. *si quadr. paup.* (ix. 1), — *noxae dedere est tradere uiuum*. And rightly, if either the owner or a third party had culpably caused his death; in either of those cases the owner was still liable, — in the former because by his own act he had deprived himself of his *facultas dedendi*, in the latter because he was entitled to damages from the

third party in fault. It might be, however, that after litiscontestation the slave or animal had died a natural death; what then? This not improbably was the question to which an answer is given in what of the text remains.

- §§ 82-87. Comp. tit. I. *DE HIS PER QVOS AGERE POSSVMVS* (iv, 10); also Fr. Vat. §§ 317-341.

- § 82. Comp. Cic. *pro Rosc. com.* xviii, 53; Ps.-Ascon. in Cic. *Div.* § 11 (Bruns, p. 291); pr. tit. I. *afd.*

<sup>1</sup> Comp. fr. 123, pr. D. *de R. I.* (1, 17).

<sup>2</sup> The ms. has *propequam*; P. *proprie quam*.

<sup>3</sup> *Pro populo, pro libertate, pro tutela*, pr. tit. I. *afd.*

- § 83. Comp. § 97; Paul. ex Festo, v. *Cognitor* (Bruns, p. 238); Fr. Vat. §§ 318 f.; Isidor. *Differ.* 123.

dicat: QVOD EGO TECVM AGERE VOLO, IN EAM REM COGNITOREM DO; aduersarius ita: QVIA TV MECVM AGERE VIS, IN EAM REM COGNITOREM DO: nec interest praesens an absens cognitor detur; sed si absens datus fuerit, cognitor ita erit si cognouerit  
 84 et susceperit officium cognitoris. Procurator uero nullis certis uerbis in litem substituitur, sed ex solo mandato, et absente et ignorante aduersario, constituitur: quin etiam sunt qui putant eum quoque procuratorem uideri cui non sit mandatum, si modo bona fide accedat ad negotium et caueat ratam rem dominum habiturum: quamquam et ille cui mandatum [*est*] plerumque satisdare debet,<sup>1</sup> quia saepe mandatum initio litis in obscuro est et postea apud iudicem ostenditur.  
 85 Tutores autem et curatores quemadmodum constituantur  
 86 primo commentario rettulimus. Qui autem alieno nomine agit, intentionem quidem ex persona domini sumit, condemnationem autem in suam personam conuertit: nam si uerbi gratia Lucius Titius [*pro*] Publio Meuius agat, ita formula con-

raise an action against you, I give you so and so as my cognitor in it;’ and the defender: ‘As you propose to raise an action against me, I give you in it so and so as my cognitor.’ And it is immaterial whether the party thus accredited as cognitor be present or absent; but if he have been nominated in absence, he will not actually be cognitor until he has heard of his appointment and accepted office.  
 84 No words of style are used in appointing a procurator as substitute in a litigation; a mandate to him is sufficient, though granted in the absence and without the knowledge of the adversary. Some jurists go so far even as to hold that a man may be regarded as a procurator who has no mandate, provided he intervene in good faith and give security that his principal will ratify his actings; although he who has a mandate is also in most cases bound to give the same caution, the existence of the mandate being often not quite clear in the first stage of a process, though afterwards proved before  
 85 the judge. How tutors and curators are appointed has  
 86 been explained in our First Commentary. A person suing on another’s account frames his intention in name of his principal, but formulates the condemnation in his own favour. Suppose Lucius Titius to be suing as agent of Publius Meuius,

§ 84. Comp. Paul. ex Festo as in last note; Paul. i. 3; Fr. Vat. §§ 112, 333; § 1, tit. I. afd.

<sup>1</sup> Comp. §§ 90, 98.

§ 85. § 2, tit. I. afd. Comp. i. §§ 144 f.

§ 86. Comp. § 55; Th. iv, 10, § 2.

cipitur: SI PARET NVMERIVM NEGIDIVM PVBLIO MEVIO SESTER-  
TIVM X MILIA DARE OPORTERE, IVDEX NVMERIVM NEGIDIVM LVCIO  
TITIO SESTERIVM X MILIA CONDEMNA. SI NON PARET, ABSOLVE;  
in rem quoque si agat intendit PVBLII MEVII REM ESSE EX IVRE  
QVIRITIVM, et condemnationem in suam personam conuertit.

87 Ab aduersarii quoque parte si interueniat aliquis cum quo  
actio constituitur, intenditur dominum dare oportere, condem-  
natio autem in eius personam conuertitur qui iudicium acce-  
pit; sed cum in rem agitur, nihil in intentione facit eius persona  
cum quo agitur, siue suo nomine siue alieno aliquis iudicio  
interueniat: tantum enim intenditur rem actoris esse.<sup>1</sup>

88 Videamus nunc quibus ex causis is cum quo agitur, uel hic  
89 qui a [*git, co*]gatur<sup>1</sup> satisfacere. Igitur si uerbi gratia in rem  
tecum *agam*, satis mihi dare debes: aequum enim uisum est  
[*te i*]deo<sup>1</sup> quod interea tibi rem, quae an ad te pertineat du-  
bium est, possidere conceditur, cum satisfactione mihi cauere

the formula will run thus: 'If it appear that Numerius  
Negidius ought to pay Publius Mevius ten thousand sesterces,  
then, judge, condemn Numerius Negidius to Lucius Titius in  
ten thousand sesterces; if otherwise, acquit him;' while if  
the action be *in rem* he will maintain in his intention that  
the thing in question belongs to Publius Mevius in quiritarian  
right, and make the condemnation run in his own favour.

87 If it be on the side of the defender that an agent is inter-  
vening, it is averred in the intention that the principal is  
indebted, but the condemnation is directed against the agent,  
—the person who has really joined issue in the action. If  
however the proceedings be *in rem*, there is no mention of  
the defender in the intention, whether he be defending on his  
own account or as agent for another; all that is said in it is  
that the thing belongs to the pursuer.

88 Let us see now in what cases the defender or pursuer is  
89 required to give security. If then I am proceeding against  
you *in rem*, you must find caution; as the possession of what  
probably does not belong to you is conceded to you in the  
meantime, it is but equitable that you should give me the  
security of sureties, so that if, in the event of your being

§ 87. Comp. Fr. Vat. § 340 (1); Th. iv,  
10, § 2.

<sup>1</sup> Comp. §§ 3, 41.

§§ 88-102. Comp. tit. I. DE SATISDA-  
TIONIBVS (iv, 11).

§ 88. See i, 199, note.

<sup>1</sup> So G., K. u. S., and Hu.; the  
ms. has *qui agat* satisfacere; Bk. reads  
*qui agit, satisfacere* [debeat].

§ 89. Cp. pr. tit. I. af. d.; Paul. i, 11, § 1.

<sup>1</sup> So Hu. and K. u. S.; the ms.  
has *de eo*; G. [*te*] *de eo*.

ut si uictus sis, *nec rem*<sup>2</sup> ipsam restituas nec litis aestimationem sufferas, sit mihi potestas aut tecum agendi aut cum  
 90 sponsoribus tuis. Multoque magis debes satisfacere mihi si  
 91 alieno nomine iudicium accipias. Ceterum cum in rem actio duplex sit,—aut enim per formulam petitoriam agitur aut per sponsionem,—siquidem per formulam petitoriam agitur, illa stipulatio locum habet quae appellatur ‘iudicatum solui,’<sup>1</sup> si uero per sponsionem, illa quae appellatur ‘pro  
 92 praede litis et uindictiarum.’<sup>2</sup> Petitoria autem formula  
 93 haec est qua actor intendit rem suam esse. Per sponsionem uero hoc modo agimus: prouocamus aduersarium tali sponsione: SI HOMO, QVO DE AGITVR, EX IVRE QVIRITIVM MEVS EST, SESTERTIOS XXV NVMMOS DARE SPONDES? deinde formulam edimus qua intendimus sponsionis summam nobis dari oportere; qua formula ita demum uincimus si probauerimus rem  
 94 nostram esse. Non tamen haec summa sponsionis exigitur: nec enim poenalis est sed praeiudicialis, et propter hoc solum

defeated, you fail either to restore the thing in dispute or pay me the value of the cause, [*i.e.* the amount of your *condemnation*,] I may have the power of suing either you or them.  
 90 All the more ought you to give me security when you join  
 91 issue for a third party. But as an action *in rem* is twofold,—for it may be either by petitory formula or by sponsion,—if you sue by petitory formula there is room for what is called the *stipulatio iudicatum solui*, [*i.e.* that the judgment will be satisfied]; while if you sue by sponsion there is room for that known as the *stipulatio pro praede litis et uindictiarum*.  
 92 The petitory formula is that in which the pursuer asserts  
 93 that the thing in dispute is his. By sponsion we proceed as follows: we challenge our adversary with such a sponsion as: ‘If the slave in question is mine in quiritarian right, do you engage to give me twenty-five sesterces?’ then we draw up a formula in which we contend that the amount of the sponsion is due to us; and our success in it depends on our  
 94 proving that the slave is ours. The amount of the sponsion, however, is not exacted; for it is not penal but prejudicial, and entered into solely that by means of it a judgment may

<sup>1</sup> The ms. has *remn*’.

§ 90. Comp. pr. tit. I. afl.; Fr. Vat.

§ 317.

§ 91. Comp. Fr. Vat. § 336.

<sup>1</sup> Comp. pr. tit. I. afl.<sup>2</sup> Comp. §§ 16, 94.

§ 92. Comp. § 41.

§ 93. Comp. Cic. *II. Verr.* i, 45, § 115.

§ 94. Comp. § 13, § 16, and notes 7-9.



fit ut per eam de re iudicetur; unde etiam is cum quo agitur non restipulatur; ideo autem appellata est 'pro praede litis vindiciarum' stipulatio, quia in locum praedium successit; quia<sup>1</sup> olim, cum lege agebatur, pro lite et vindiciis, id est pro re et fructibus, a possessore petitori dabantur praedes.<sup>2</sup>

95 Ceterum si apud centumuiros agitur summam sponsionis non per formulam petimus sed per legis actionem; sacramento enim *reus prouocatur*:<sup>1</sup> eaque sponsio sestertium CXXV num-  
96 mum<sup>2</sup> *fieri solet*<sup>3</sup> propter legem *Creperiam*.<sup>4</sup> Ipse autem  
97 qui in rem agit, si suo nomine agat, satis non dat. Ac nec si per cognitorem quidem agatur ulla satisfactio uel ab ipso uel a domino desideratur: cum enim certis et quasi sollemni-

be arrived at on the question of property; and for the same reason the defender does not restipulate. The stipulation is called *pro praede litis et vindiciarum* because it has come in place of *praedes*; for formerly, under the system of the *legis actiones*, *praedes*, sureties, were given by the possessor to the pursuer *pro lite et vindiciis*, that is for the thing in dispute  
95 and its fruits and profits. If however we are proceeding in

the centumviral court we claim the amount of the sponsion by a *legis actio* and not by a formula, for the defender is challenged with a sacrament; and the sponsion in this case is one of a hundred and twenty-five sesterces, in consequence  
96 of the Creperian law. The pursuer of an *actio in rem*, suing  
97 on his own account, does not give security. Nor if the action be by a cognitor is any security required either from him or his principal; for as a cognitor is substituted for his

<sup>1</sup> So the MS.; K. u. S. and Hu. read *qui*; P. *quod*.

<sup>2</sup> So the MS., but deleted by K. u. S. and Hu. See Paul. ex Festo, v. *Praes* (Bruns, p. 256).

§ 95. Comp. § 31; also § 16, note 10.

<sup>3</sup> K. u. S. read *reum prouocamus*; Hu. *sacramento [quingenario] modo reo prouocato*; P. *sacramento maiore prouocato*.

<sup>2</sup> The old sacramental 500 *asses* (§ 14); the sesterce having been declared equivalent to 4 *asses* (instead of 2½ as formerly) at the time of the second Punic war; see Plin. *H. N.* xxxiii, 13, § 45.

<sup>3</sup> Indistinct in the MS.; K. u. S. substitute *fit scilicet*; but Stud.

(*Apogr.* footnote) rejects *scil.*, and thinks *fieri solet* possible.

<sup>4</sup> Name not quite distinct, but so Stud. deciphers it. Mommsen (*M. u. M. Roem. Alt.* ii, part 2, p. 209, footnote) supposes it to have been the enactment reducing the value of the sesterce, and perhaps conferring on the centumviral court its jurisdiction in questions of inheritance. Hu. thinks the reference must be to the *lex Iulia Papiria* of 324 | 430, converting cattle-penalties into money-penalties (100 *asses* for an ox, 10 for a sheep); but the relation of this enactment to the subject in hand is far from apparent.

§ 96. Comp. pr. tit. I. *afid.*

§ 97. Comp. § 83; Fr. Vat. § 317.

bus uerbis in locum domini substituatur cognitor, merito  
 98 domini loco habetur. Procurator uero si agat satisfacere  
 iubetur ratam rem dominum habiturum: periculum enim est  
 ne iterum dominus de eadem re experiatur; quod periculum  
 [non] interuenit si per cognitorem actum fuerit, quia de qua  
 re quisque per cognitorem egerit de ea non magis amplius  
 99 actionem habet quam si ipse egerit. Tutores et curatores  
 eo modo quo et procuratores satisfacere debere uerba edicti  
 100 faciunt; sed aliquando illis satisfactio remittitur. Haec ita  
 si in rem agitur; si uero in personam, ab actoris quidem  
 parte quando satisfacere debeat quaerentes, eadem repetemus  
 101 quae diximus in actione qua in rem agitur. ab eius uero  
 parte cum quo agitur, siquidem alieno nomine aliquis inter-  
 ueniat, omni modo satisfacere debet, quia nemo alienae rei sine  
 satisfactioe defensor idoneus intellegitur: sed siquidem cum  
 cognitore agatur, dominus satisfacere iubetur; si uero cum pro-  
 curatore, ipse procurator. idem et de tutore et de curatore  
 102 iuris est. Quodsi proprio nomine aliquis iudicium accipiat  
 in personam, certis ex causis<sup>1</sup> satisfacere solet, quas ipse praetor

principal by certain quasi-solemn words, he is rightly enough  
 98 regarded as in the same position as his principal. A pro-  
 curator, however, if he is suing, must give security that his  
 principal will ratify his actings; for there is some risk that  
 the principal may subsequently proceed anew in the very  
 same matter. But there is no such risk where it is a  
 cognitor that is suing; for a man suing by a cognitor has no  
 more power to raise a new action about the same matter than  
 99 he would have were he suing in person. By the terms of  
 the edict tutors and curators are required to give the same  
 security as procurators; but it is sometimes dispensed with.  
 100 These observations apply to the case of an action *in rem*.  
 Where it is *in personam* the rules are the same so far as the  
 101 pursuer is concerned. As regards the defender, if a third  
 party appear for him, security must be given in any circum-  
 stances; for no one is esteemed an adequate defender in  
 another person's cause without it. If the defence be con-  
 ducted by a cognitor, it is the principal that must give  
 security; if by a procurator, it is the agent that gives it.  
 102 The rule is the same in the case of a tutor or curator. In  
 certain cases mentioned by the praetor the defender in an

§§ 98-101. Comp. pr. § 1, tit. I. afd.

§ 102. Cp. § 1, tit. I. afd.; Fr. Vat. § 336.

<sup>1</sup> After *causis* Hu. interpolates  
*iudicatum solui*.

significat: quarum satisfactionum duplex causa est, nam aut propter genus actionis satisdatur, aut propter personam quia suspecta sit: propter genus actionis, ueluti iudicati<sup>2</sup> depensive,<sup>3</sup> aut cum de moribus mulieris agetur;<sup>4</sup> propter personam, ueluti si cum eo agitur qui decoxerit,<sup>5</sup> cuiusue bona a creditoribus possessa proscriptaue sunt,<sup>6</sup> siue cum eo herede agatur quem praetor suspectum aestimauerit.<sup>7</sup>

- 103 Omnia autem iudicia<sup>1</sup> aut legitimo iure consistunt aut  
104 imperio continentur.<sup>2</sup> Legitima sunt iudicia quae in urbe Roma uel intra primum urbis Romae miliarium inter omnes ciues Romanos sub uno iudice accipiuntur; eaque e lege Iulia iudicaria nisi in anno et sex mensibus iudicata

action *in personam* must give security even when conducting his own defence. And this security may be required either because of the nature of the action, or because of some suspicion attaching to the defender personally: on account of the nature of the action in the *actio iudicati*, the *actio depensi*, and the action in which the behaviour of a married woman is called in question; on account of the person, as when the action is against an embezzler or a bankrupt, or against an heir whom the praetor regards as suspect.

- 103 All proceedings before *iudices* are either *iudicia legitima* or  
104 *iudicia imperio continentia*. Those are *iudicia legitima* which are carried on in Rome or within the first milestone from the city, between parties who are all citizens, and before a single judge. According to one of the Julian judiciary laws they

<sup>2</sup> Comp. §§ 21, 171.

<sup>3</sup> Comp. iii, 27; iv, §§ 22, 171.

<sup>4</sup> Comp. Vlp. vi, §§ 9, 12; l. 1, C. Th. de dot. (iii, 13); l. 11, § 2, C. de repud. (v, 17).

<sup>5</sup> It is difficult to give a precise meaning to this word. See Cic. Philipp. ii, 18, § 44; Sen. Ep. 36, § 5; Spartian. Hadr. 18; l. 12, C. de susceptor. (x, 70).

<sup>6</sup> Comp. iii, 79; Cic. pro Quint. viii, 30.

<sup>7</sup> Comp. Vlp. in fr. 31, D. de reb. auct. iud. poss. (xlii, 5).

§ 103. Comp. i, 184; iii, §§ 83, 181; iv, 80.

<sup>1</sup> *Iudicium* is sometimes employed loosely as synonymous with *actio*. Properly it was the name given to a process after the magistrate had

sent it to a court for trial; either to a single *iudex* (then *iudicium* in the narrowest sense), or to an arbiter (then sometimes called *arbitrium*), or to recuperators (*iudicium recuperatorium*).

<sup>2</sup> So G. and all eds.; the MS. has *continunt*.

§ 104. The law here referred to is the *lex Iulia Iudiciaria* (*iudiciorum priuatorum*), mentioned above, § 30. It is probable that it was this enactment that settled, by enumeration of their conditions, what *iudicia* should be dealt with as *legitima* and what as *imperio continentia*; otherwise one would have expected to have found included amongst the latter, contrary to what appears in § 109, all those that arose out of actions due solely to praetorian agency.

x *actio rei uxoriae* when the wife is sued -

fuerint expirant:<sup>1</sup> et hoc est quod uulgo dicitur e lege Iulia  
 105 litem anno et sex mensibus mori. Imperio uero continetur recuperatoria et quae sub uno iudice accipiuntur interueniente peregrini persona iudicis aut litigatoris; in eadem<sup>1</sup> causa sunt quaecumque extra primum urbis Romae miliarium tam inter ciues Romanos quam inter peregrinos accipiuntur: ideo autem imperio contineri iudicia dicuntur, quia tamdiu ualent quamdiu is qui ea praecepit imperium habebit.<sup>2</sup> Et siquidem imperio continenti iudicio

come to an end in a year and a half if judgment have not been pronounced by that time; and this is what is meant by the vulgar saying that by the Julian law an action dies  
 105 in eighteen months. Those *iudicia* are *imperio continentia* that proceed before recuperators, as also those before a single judge, in which either he or any of the litigants is a peregrin, and those carried on, whether by citizens or peregrins, at a greater distance than a mile from Rome; they are so called because they last only so long as the *imperium* of the magistrate who granted them. Now, suppose a man sues in a

<sup>1</sup> It is said that prior to this enactment all such actions were perpetual, *i.e.* might be in dependence for an indefinite period (Hu., note to this par.). That might be so with a *iudicium* formulated upon an action based upon the *ius ciuile*; but that it should have been the case with one that had no foundation except in the *ius honorarium*, and that could in no sense be called statutory before Julian's consolidated edict (temp. Hadr., 1, 2, § 18, C. *de uet. iur. enucl.* i, 17) had been approved by a senatusconsult, is inconsistent with all one's ideas of the *tuitio praetoris*, and not easily reconciled with what Gai. states in §§ 110, 111. It seems more probable that while the *lex Iulia* limited the duration of *iudicia* founded on the *ius ciuile*, it extended that of such as were founded solely on the edict, provided always the three conditions above mentioned were concurrent. In fact it augmented the number of the *legitima iudicia* by giving to the term a new and more artificial meaning.

§ 105. Reference to recuperators, instead of to a *iudex*, was practised originally in causes to which foreigners were parties, and in virtue of provisions

for recuperation in the treaties between Rome and friendly states, Fest. v. *Reciperatio* (Bruns, p. 259). In course of time, thanks probably to its expedition, it came to be adopted in certain cases even where none but citizens were concerned. This happened, for example, in all litigations of private right, fiscal or otherwise, raised by the state against citizens; in the *actio iniuriarum* and *a. ui bonor. raptorum*; in actions for penalties incurred through contravention of magisterial edicts for regulating procedure (see §§ 46, 185), etc. In many cases it was free to the magistrate to remit either to a *iudex* or to recuperators, the latter being preferred where a speedy judgment was desirable. Reference to recuperators was the ordinary practice in the provinces; for peregrins could act in that character, though incompetent as *iudices*.

<sup>1</sup> So G. and all eds.; the ms. has simply *ea*.

<sup>2</sup> Comp. Vlp. in fr. 13, § 1, D. *de iurisd.* (ii, 1).

§ 106. Comp. iii, §§ 180, 181, and note; iv, § 121. The reason why here fresh proceedings might be commenced *ipso iure* was that the earlier



- actum*<sup>1</sup> fuerit, siue in rem siue in personam, siue ea formula quae in factum concepta est, siue ea quae in ius habet intentionem postea nihilo minus ipso iure de eadem re agi potest; et ideo necessaria est exceptio rei iudicatae uel in iudicium deductae.
- 107 *si uero*<sup>1</sup> legitimo iudicio in personam actum sit ea formula quae iuris ciuilis habet intentionem, postea ipso iure de eadem re agi non potest,<sup>2</sup> et ob id exceptio superuacua est; si uero uel in rem uel in factum actum fuerit, ipso iure nihilo minus postea agi potest,<sup>3</sup> et ob id exceptio necessaria est rei
- 108 iudicatae uel in iudicium deductae. Alia causa fuit olim legis actionum: nam qua de re actum semel erat, de ea postea

- iudicium* of this latter sort, and no matter whether his action be *in rem* or *in personam*, or his formula *in ius* or *in factum*, he is nevertheless entitled, in strict law, to sue again on the same premises; to prevent this an exception is necessary either of judgment recovered or of previous submission of the
- 107 matter to the arbitrament of a judge. But if he sue in a *legitimum iudicium*, by an action *in personam* with a formula containing an *intentio iuris ciuilis*, further action by him on the same premises is *ipso iure* incompetent, and an exception is consequently superfluous; but if his action have been *in rem*, or [his formula] *in factum*, he is *ipso iure* entitled to sue afresh, so that here also an exception becomes necessary
- 108 either of judgment recovered or matter put in issue. It was different formerly with the *legis actiones*: [under that system], if there had once been an action about any par-

ones were *ipso iure* of no effect,—they were effectual only in virtue of the *imperium*.

- <sup>1</sup> The ms. has *pactum*, i.e. *peractum*; but *actum* is more appropriate, and the word employed in next par.
- § 107. References as in note to § 106.

<sup>2</sup> The ms. has *at* (or *ai*) *u* (with superscribed *o*); Hu. reads *at si*; P. *at ubi*.

<sup>3</sup> Because of the novation involved in the *litis contestation*, iii, §§ 180, 181.

<sup>3</sup> There could be no novation in an *actio in rem*, or in one *in personam* with a *formula in factum concepta*; in the former because no obligation was involved, in the latter because none was averred.

- § 108. This is not to be understood as a statement that under the system of the *legis actiones* no account could

be taken of any plea in defence that under the formular system became matter of exception. It may be that pleas arising from statute, such as those founded on the *leges Furiae*, *lex Cincia*, *lex Plaetoria*, etc., were presented in what Ihering (*G. d. R. R.* iii, p. 49) calls an after-suit; but the probability is that *res iudicata* or *res in iudicium deducta* was pleaded in the form of a prescription (§ 133), which, if proved, was a bar to the entertaining of the action (Keller, *R.C.P.* § 43; Beth. Hollweg, *R.C.P.* ii, p. 401). This view receives some countenance from the fact that the *exceptio rei iudicatae* is occasionally spoken of as a *praescriptio*, e.g. in fr. 42, D. *de lib. causa* (xl, 12), fr. 63, D. *de re iud.* (xlii, 1), etc.

- ipso iure agi non poterat; nec omnino ita ut nunc usus erat  
 109 illis temporibus exceptionum. *Ceterum* potest ex lege quidem esse iudicium sed legitimum non esse; et contra ex lege non esse, sed legitimum esse; nam si uerbi gratia ex lege Aquilia uel Ollinia uel Furia in prouinciis agatur, imperio continebitur iudicium; idemque iuris est et si Romae apud recuperatores agamus, uel apud unum iudicem interueniente peregrini persona; et ex diuerso si ex ea causa ex qua nobis edicto praetoris datur actio, Romae sub uno iudice inter omnes ciues Romanos accipiatur iudicium, legitimum est.
- 110 Quo loco admonendi sumus eas quidem actiones quae ex lege senatusue consultis proficiscuntur, perpetuo solere praetorem accommodare, eas uero quae ex propria ipsius iurisdictione pendent, plerumque intra annum dare. Aliquando  
 111 tamen (*et perpetuo eas dat, uelut quibus*)<sup>1</sup> imitatur ius legiti-

*ipso iure*  
 ticular thing, it was impossible for the pursuer *ipso iure* to sue again; nor were there in those days any exceptions in  
 109 use such as we have now. A *iudicium* may quite well be based on a *lex* [or statute] and yet not be a *iudicium legitimum*, and conversely may be *legitimum* though not founded on statute. For if proceedings be taken in a province on the Aquilian law say, or the Ollinian or Furian, the *iudicium* will be *imperio continens*; and so it will though the proceedings be in Rome, if they be before recuperators, or even before a single judge when he or either of the parties happens to be a peregrin. On the other hand, if the proceedings be in Rome, at the instance of parties who are all citizens, and before a single judge who also is a citizen, the *iudicium* will be *legitimum* even though the action be one introduced by the praetor's edict.

- 110 It may here be observed that actions attributable to a law or senatusconsult may be granted by the praetor at any distance of time, but those that depend on his proper jurisdiction are granted by him for the most part only within a year [of  
 111 the occurrence to which they relate]. Sometimes, however, he grants actions of this sort even in perpetuity,—such,

§ 109. Of the *L. Ollinia* mentioned in this par. nothing is known. It is probable that the copyist has made a mistake in the name, as Gai. would likely take as his illustration some statute with which every one was familiar. But the error, if it be one, does not affect the argument.

§§ 110-114. Comp. tit. I. *DE PERPETVIS ET TEMPORALIBVS ACTIONIBVS, ET QVAE AD HEREDES VEL IN HEREDES TRANSEVNT* (iv, 12).

§ 110. Comp. pr. tit. I. *afid.*

§ 111. Comp. pr. tit. I. *afid.* 7

<sup>1</sup> So Hu.; the words are illegible in the ms. K. u. S., P., and M. (K.

mum: quales sunt eae quas bonorum possessoribus ceterisque qui heredis loco sunt *eoue efficiuntur dare solet*.<sup>2</sup> furti quoque manifesti actio, quamuis ex ipsius praetoris iurisdictione proficiscatur,<sup>3</sup> perpetuo datur; et merito, cum<sup>4</sup> pro capitali poena pecuniaria constituta sit.

- 112 Non<sup>1</sup> omnes actiones quae in aliquem aut ipso iure competunt aut a praetore dantur etiam in heredem aequae competunt aut dari solent: est enim certissima iuris regula ex maleficiis poenales actiones in heredem nec competere nec dari solere, uelut furti, ui bonorum raptorum, iniuriarum, damni iniuriae: sed *heredibus quidem* [uidelicet actoris]<sup>2</sup> huiusmodi actiones competunt nec denegantur, excepta iniuriarum actione et si qua alia similis inueniatur actio.
- 113 Aliquando tamen [*etiam*] ex contractu actio neque heredi ne-

namely, as are modelled upon the common law; as, for example, those he is in the practice of giving to *bonorum possessoribus* and other persons in the position of or by him treated as heirs. The *actio furti manifesti*, too, though it is a creature of the praetor's jurisdiction, is perpetual; and very properly, seeing the pecuniary penalty in it is merely a substitute for the [original] capital punishment.

- 112 Not every action that is competent against a man at common law, or that will be granted against him by the praetor, is equally competent or will equally be granted against his heir; for it is one of the best settled rules of law that penal actions resulting from delict, such as those consequent on theft, robbery, wrongful damage to property, or personal injury, neither are competent nor will be granted against the heir of the delinquent. Such actions, however, are competent and will not be denied to the heirs [of the party wronged], with the exception of the *actio iniuriarum* and others, if there
- 113 be such, of the same class. Sometimes even an action

u. S. footnote) substantially agree with Hu. Gou. prefers *praetor quibusdam actionibus dandis*.

<sup>2</sup> For the last four words I am indebted partly to Gou. and partly to Hu. K. u. S. and P. use instead the one word *accommodat*, as in the Inst.; but not only is the space in the ms. much too great for it,—the *quueejjci...iias* of the *Apogr.* come very near *eoue efficiunt' ds*. A *bonorum emptor* may be taken as an example of a person *qui heredis loco praetore efficitur* (§ 35).

<sup>3</sup> Comp. iii, 189.

<sup>4</sup> So the ms.; Hu. has *cum tantum*.

§ 112. Comp. Gai. in fr. 111, § 1, D. de R. I. (l, 17); § 1, tit. I. afd.

<sup>1</sup> Hu. reads *contra non*.

<sup>2</sup> The words *uid. actoris* seem to be a gloss. There are four letters illegible after *hdi*, which I assume to have been *bqui*; hence the reading *heredibus quidem*. Hu. reads *heredi defuncti uidelicet actoris*; K. u. S. read *heredibus*, and omit the next three words; P. *heredibus quidem*, omitting the other two.

§ 113. Comp. § 1, tit. I. afd., from which *etiam* is borrowed.

que in heredem conpetit : nam adstipulatoris heres non habet actionem,<sup>1</sup> et sponsoris et fidepromissoris heres non tenetur.<sup>2</sup>

- 114 Superest ut dispiciamus, si ante rem iudicatam is cum quo agitur post acceptum iudicium satisfaciatur actori, quid officio iudicis conueniat, utrum absolvere, an ideo potius damnare quia iudicii accipiendi tempore in ea causa fuerit ut damnari debeat.<sup>1</sup> nostri praeceptores<sup>2</sup> absolvere eum debere existimant; nec interesse<sup>3</sup> cuius generis sit iudicium : et hoc est quod uulgo dicitur Sabino et Cassio<sup>2</sup> placere omnia iudicia *absolutoria esse*. — — — —<sup>4</sup> *de bonae fidei iudiciis autem* idem sentiunt, quia in eiusmodi iudiciis liberum est officium iudicis.<sup>5</sup> tantumdem et de in rem actionibus putant, *quia* <sup>6</sup> — — — — — sunt etiam in personam tales

upon contract is not competent to or against an heir; for the heir of an *adstipulator* cannot sue, and the heir of a *sponsor* or *fideipromissor* cannot be sued.

- 114 Now let us see what is the duty of the judge if, before judgment, but after issue joined, the defender has satisfied the pursuer's demand; is he to acquit, or is he bound to condemn, on the ground that, at the moment when the cause was remitted to him, the defender's position was such as to warrant condemnation? Our authorities think that he ought to pronounce judgment of acquittal, and that no matter what the nature of the action; this is the meaning of the common saying that according to Sabinus and Cassius all *iudicia* are absolutive. *The leaders of the other school* — — — —. As regards *bonae fidei iudicia*, however, they are of the same opinion, because in them the judicial office has free scope. And they extend the same rule to actions *in rem*; because — — — — —. There are even some

<sup>1</sup> Comp. iii, 114.

<sup>2</sup> Comp. iii, 120.

§ 114. Comp. § 2, tit. I. afd. P. 227 is for the most part illegible, the 1st, 4th, and 24th lines being the only ones that are complete. There is reason to believe that in lines 6-22 Gai. proceeded to refer to the *actiones arbitrarie*, both *in rem* and *in personam*, in which the judge was authorized, if he found the case proved, to make such order on the defender as he considered would meet the justice of the case, and, if it were complied with, to acquit him; see § 31, tit. I. *de act.* (iv, 6).

<sup>1</sup> Comp. iii, 180. '.

<sup>2</sup> Comp. i, 196, note 1.

<sup>3</sup> So G. and most eds.; the ms. and P. have *interest*.

<sup>4</sup> The suggestion of K. u. S. (foot-note) commends itself,—that Gai. here affirmed of the Proculians that they held a different opinion in so far as *stricti iuris* actions were concerned; the only objection is that there is not room for it in the lacuna of half a line.

<sup>5</sup> Comp. § 30, tit. I. *de act.* (iv, 6).

<sup>6</sup> The next few words, according to K. u. S., are *quia formulae uerbis id ipsum exprimitur*.



actiones in quibus<sup>7</sup> — — — — — actum fuit.

- 115 Sequitur ut de exceptionibus dispiciamus. [116] Con-  
 116 paratae sunt autem exceptiones defendendorum eorum gratia cum quibus agitur: saepe enim accidit ut quis iure civili teneatur, sed iniquum sit eum iudicio condemnari: ueluti si stipulatus sim a te pecuniam tamquam credendi causa numeraturus, nec numerauerim; nam eam pecuniam a te peti posse certum est; dare enim te oportet, cum ex stipulatu teneris; sed quia iniquum est te eo nomine condemnari, placet per  
 116a exceptionem doli mali te defendi debere. item si pactus fuero tecum ne id quod mihi debeas a te petam, nihilo minus id ipsum<sup>1</sup> a te petere possum dari mihi oportere, quia obligatio pacto conuento non tollitur; sed placet debere me petentem

actions *in personam* of this class, in which — — — — —

- 115 We must next turn our attention to exceptions. [116] They  
 116 have been devised for the sake of defenders; for it often happens that a man may be liable according to strict law, and yet that it would be contrary to equity to condemn him. Suppose that, under the expectation that I was about to advance you in loan a certain sum of money, you have given me a stipulatory engagement for that amount, and that after all I have not made the advance: there is no doubt that I am entitled to sue you for the money, for you are bound to pay it, being obliged by the stipulation; but as it would be inequitable in such circumstances that you should be condemned, you are allowed in defence to plead an exception of dolo.  
 116a Again, suppose I have agreed not to take proceedings against you for what you owe me, I am nevertheless entitled to sue, and to maintain that you are bound to pay me the very thing I had agreed not to claim, because an obligation cannot be extinguished by [bare] agreement; but it is held that if you plead an *exceptio pacti conuenti* in answer to my claim, I will

<sup>7</sup> This may have been the commencement of a reference to some of the *actiones arbitrariae in personam*. Huschke's reconstruction is too conjectural to be reproduced.

§§ 115-125. Comp. tit. I. *DE EXCEPTIONIBVS* (iv, 13).

§ 115. Pr. tit. I. *afid.*

§ 116. Comp. pr. § 2, tit. I. *afid.*

§ 116a. Comp. § 3, tit. I. *afid.*

<sup>1</sup> K. u. S. regard *id ipsum* as a gloss; Hu. substitutes *id ipso iure*. But, as Gou. points out, the words are appropriate, as indicating the very *id* which it had been agreed should not be sued for.

117 per exceptionem pacti conuenti repelli. In his quoque actionibus quae [*non*]<sup>1</sup> in personam sunt exceptiones locum habent, ueluti si metu me coegeris aut dolo induxeris ut tibi rem aliquam mancipio *darem*; *nam si*<sup>2</sup> eam rem a me petas, datur mihi exceptio per quam, si metus causa te fecisse uel  
 117a dolo malo arguero, repelleris. item si fundum litigiosum sciens a non possidente emeris eumque a possidente petas, opponitur tibi exceptio per quam omni modo summoueris.  
 118 Exceptiones autem alias in edicto praetor habet propositas, alias causa cognita accommodat. quae omnes uel ex legibus uel ex his quae legis uicem optinent substantiam capiunt, uel  
 119 ex iurisdictione praetoris proditae sunt. Omnes autem exceptiones in contrarium concipiuntur, *quia*<sup>1</sup> adfirmat is cum quo agitur: nam si uerbi gratia reus dolo malo aliquid actorem

117 be defeated. There is room for exceptions even in actions that are not *in personam*, as when you have constrained me by threats, or induced me by doleful representations, to convey something to you by mancipation; for if you raise an action against me to obtain possession of it, I am entitled to an exception, whereby, if I prove that there was intimidation or  
 117a dole on your part, your action will be defeated. So also if you have knowingly purchased, from one not in possession of them, lands then forming the subject-matter of a litigation, and you raise action for them against the possessor, he will be entitled to state an exception which will effectually displace  
 118 your claim. Some exceptions are published by the praetor in the edict, others are granted on cause shown. And all are either founded on statute or some enactment that has the force thereof, or have been devised by the praetor in the exercise of his jurisdiction. All exceptions are formulated  
 119 negatively; for the affirmative proceeds from the pursuer. For example, if the defender avers that there has been dole on

§ 117. Comp. § 4, tit. I. afđ.

<sup>1</sup> Added by G.

<sup>2</sup> The ms. has *deminansin*. P. reads *rem aliquam mancipi d[ar]em man[cipio]*; *si enim*, etc., which is ingenious.

§ 117a. Comp. Fr. de Iure Fisci, § 8; fr. 1, § 1, fr. 2, D. *de litig.* (xlv, 6).

§ 118. Comp. § 7, tit. I afđ.

§ 119. Comp. Paul. in fr. 22, pr. D. *de except.* (xlv, 1).

<sup>1</sup> So Gou.; the ms. has *qui*; K. u. S., Hu., and most eds. *quam*. Although

there were one or two actions in which the pursuer maintained a negative, *e.g.* in denial of the existence of a servitude over his property, yet the rule was that he maintained an affirmative; and in his exception the defender by implication admitted that, on substantiating his averment, the pursuer would be entitled to judgment if something had *not* happened—that, namely, which was averred by the defender—to exclude it.

facere dicat, qui forte pecuniam petit quam non numeravit, sic exceptio concipitur: SI IN EA RE NIHIL DOLO MALO AVLII AGERII FACTVM SIT NEQVE FIAT; item si dicat contra pactionem pecunia peti, ita concipitur exceptio: SI INTER AVLVM AGERIVM ET NVMERIVM NEGIDIVM NON CONVENIT NE EA PECVNIA PETE-RETVR; et denique in ceteris causis similiter concipi solet: ideo scilicet quia omnis exceptio obicitur quidem a reo, sed ita formulae inseritur ut condicionalem faciat condemnationem, id est ne aliter iudex eum cum quo agitur condemnet, quam si nihil in ea re qua de agitur dolo actoris factum sit; item ne aliter iudex eum condemnet quam si nullum pactum conventum *de* non petenda pecunia factum *fu*erit.

- 120 Dicuntur autem exceptiones aut peremptoriae aut dila-  
121 toriae. Peremptoriae sunt quae perpetuo valent nec evitari possunt, ueluti quod metus causa,<sup>1</sup> aut dolo malo,<sup>1</sup> aut quod contra legem senatusue consultum factum est,<sup>2</sup> aut quod res iudicata est,<sup>3</sup> uel in iudicium deducta est,<sup>3</sup> item pacti conuenti

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the part of the pursuer, who perhaps is claiming repayment of money which he has never advanced, the exception will be in such terms as these: 'if there neither has been nor is any dole in the matter on the part of Aulus Agerius; 'if his averment be that the pursuer is claiming payment notwithstanding an agreement to the contrary, it will run thus: 'if there has been no agreement between Aulus Agerius and Numerius Negidius that the money should not be sued for;' and in other cases it will be framed in like manner. It is always the defender that states the exception, but it is so engrafted on the formula as in effect to render the clause of condemnation conditional: in other words, it instructs the judge, in the one case, that he is not to condemn the defender unless there have been no dole in the matter on the part of the pursuer; in the other, that he is not to condemn unless there has been no agreement between the parties that action would not be taken upon the debt.

- 120 Exceptions are said to be either peremptory or dilatory.  
121 Those are peremptory that remain available always, and cannot be excluded; such are the exceptions of constraint or dole, of contravention of a law or senatusconsult, of judgment recovered, of submission of a cause to the arbitrament of a judge,

§ 120. Comp. § 8, tit. I. afd.

§ 121. Comp. § 9, tit. I. afd.

<sup>1</sup> Comp. § 117.

<sup>2</sup> Comp. § 118.

<sup>3</sup> Comp. iii, 181; iv, 106.

- 122 quod factum est ne omnino pecunia peteretur.<sup>4</sup> Dilatoriae sunt exceptiones quae ad tempus valent, ueluti illius pacti conuenti quod factum est uerbi gratia ne intra quinquennium peteretur; finito enim eo tempore non habet locum exceptio. cui similis exceptio est litis diuiduae<sup>1</sup> et rei residuae:<sup>2</sup> nam si quis partem rei petierit et intra eiusdem praeturam reliquam partem petat, hac exceptione summouetur quae appellatur litis diuiduae;<sup>1</sup> item si is qui cum eodem plures lites habebat, de quibusdam egerit, de quibusdam distulerit ut ad alios iudices eant,<sup>3</sup> si intra eiusdem praeturam de his quas ita distulerit agat, per hanc exceptionem quae appellatur rei residuae<sup>2</sup> summouetur. Obseruandum est autem ei cui dilatoria obicitur exceptio, ut differat actionem; alioquin si obiecta exceptione egerit, rem perdit; nec enim, post illud tempus quo integra re [*eam*]<sup>1</sup> euitare poterat, adhuc ei potestas agendi superest, re in iudicium deducta et per exceptionem perempta. Non solum autem ex tempore sed etiam ex

- 122 and of absolute agreement not to sue. Those are dilatory that are available only for a time, such as that of an agreement not to sue say for five years; on their expiry there is no longer any room for the exception. To the same class belong the *exceptio litis diuiduae* and *exceptio rei residuae*: for if an individual have raised action for part only of that to which he is entitled, and afterwards, and within the same praetorship, sues for the remainder, he may be barred by an exception of divided suit; and if a man who has several causes of action against the same party, and has proceeded in some of them, but held over others in order to bring them before other judges, have begun to sue upon these last within the same praetorship, he may be met with an exception of claim held over. When a dilatory exception is pleaded the pursuer should be careful to postpone his action; if he go on in face of it, he will lose his case; and, if this have been once submitted to a judge and thrown out on the strength of the exception, he will be unable to proceed afresh even after the time when, had matters been entire, the exception might have been elided. Dilatory exceptions may be founded not

<sup>4</sup> Comp. §§ 119, 126. though *apud iudicem agere* is frequent enough, *ad iudicem agere* is a phrase unknown.  
 § 122. Comp. § 10, tit. I. afd.  
<sup>1</sup> Comp. §§ 56, 131.  
<sup>2</sup> Comp. l. 10, C. *de iud.* (iii), § 123. Comp. § 10, tit. I. afd.  
 1). <sup>1</sup> Added by Hu., and generally adopted.  
<sup>3</sup> The ms. has *egant*. Hu. reads *agantur*; but, as Gou. observes, § 124. Comp. § 11, tit. I. afd.



- persona dilatoriae exceptiones intelleguntur, quales sunt cognitoriae,<sup>1</sup> uelut si is qui per edictum cognitorem dare non potest per cognitorem agat, uel dandi quidem cognitoris ius habeat, sed eum det cui non licet cognituram suscipere: nam si obiciatur exceptio cognitoria, si ipse talis erit ut ei non liceat cognitorem dare, ipse agere potest; si uero cognitori non liceat cognituram suscipere, per alium cognitorem aut per semet ipsum liberam habet agendi potestatem, et tam hoc quam illo modo euitare [*potest*]<sup>2</sup> exceptionem: quodsi dissimulauerit *eum et*<sup>3</sup> per cognitorem egerit, rem perdit. Sed peremptoria quidem exceptione *si reus per errorem* non fuerit usus, in integrum restituitur *adiciendae* exceptionis gratia: dilatoria uero si non fuerit *usus*, an in integrum restituatur, quaeritur.
- 126 Interdum euenit ut exceptio quae prima facie iusta uideat-

- only on some objection to the time of suing, but also on some objection to the person of the pursuer, as in the *exceptiones cognitoriae*. Suppose, for example, that a man is suing by a cognitor who is not by the edict entitled to do so, or that he has accredited as his cognitor a person who cannot act in that capacity: if an *exceptio cognitoria* be stated, the principal who is not entitled to appoint such an agent may sue in person, while, if the objection be to the qualification of the party nominated as cognitor, he may appoint another instead of him or sue in person, and in either way elide the exception; but if [in either case] he disregard it, and allow the action to proceed in the name of the cognitor [originally nominated],
- 125 he loses his cause. If a defender have by inadvertence omitted to avail himself of a peremptory exception competent to him, he will be reinstated by the praetor in order that it may be added [to the formula]; but it is disputed whether there can be such reinstatement when it is only a dilatory exception that has been overlooked.
- 126 It sometimes happens that an exception, which *prima facie*

<sup>1</sup> Comp. § 83; Paul. i, 2, §§ 1, 2; Fr. Vat. §§ 322 f.; Quintil. *Inst. Or.* vii, 1, §§ 19 f.

<sup>2</sup> Added by G., and adopted by all eds.

<sup>3</sup> So Hu., following Hollweg, and justified by Th. iv, 13, § 11. The MS. has *cum ei* or *cum et*, the two last letters being indistinct. K. u.

S. read [*et*] *cum ei* [*per cognitorem agere non liceret, nihilo minus*] *per cognitorem*; M. (K. u. S. p. xxii) proposes *tum et per cognitorem*.

§ 125. Comp. §§ 53, 57, 123; l. 2, C. *sent. rescind. non posse* (vii, 50).

§§ 126-129. Comp. tit. I. *DE REPLICATIONIBVS* (iv, 14).

§ 126. Pr. tit. I. *af.*

tur inique noceat actori: quod cum accidit alia adiectione opus est adiuuandi actoris gratia: quae adiectio replicatio uocatur, quia per eam replicatur atque resoluitur uis exceptionis: nam si uerbi gratia pactus sum tecum ne pecuniam quam mihi debes a te peterem, deinde postea in contrarium pacti sumus, id est ut petere mihi liceat, et, si agam tecum, excipias tu ut ita demum mihi condemneris si non conuenerit ne eam pecuniam peterem, nocet mihi exceptio pacti conuenti; namque nihilo minus hoc uerum manet etiam si postea in contrarium pacti sumus; sed quia iniquum est me excludi exceptione, replicatio mihi datur ex posteriore pacto hoc modo: SI NON POSTEA CONVENERIT VT MIHI EAM PECVNIAM

126a PETERE LICERET. Item si argentarius pretium rei quae in auctionem uenierit persequatur, obicitur ei exceptio ut ita demum emptor damnetur si ei res quam emerit tradita est; et est iusta exceptio: sed si in auctione praedictum est ne ante emptori traderetur quam si pretium soluerit, replicatione tali

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seems just enough, will yet bear inequitably upon the pursuer. When this occurs it becomes necessary to introduce yet another clause into the formula for the pursuer's benefit, which is called a replication, because thereby the force of the exception is replicated and destroyed. Suppose, for example, that I have agreed not to proceed against you for money you owe me, and that subsequently we enter into a counter-agreement that I may sue if I please; if I do sue, you may except that you are to be condemned to me only if there have been no agreement not to sue. That exception forms a bar to my action; for there was such an agreement between us, although followed by one contradicting it. But, as it would be inconsistent with equity that my claim should thus be defeated, I am allowed a replication upon the subsequent agreement in these terms: 'if there have been no later agreement giving

126a me leave to sue.' Or suppose an auctioneer sues for the price of a thing he has sold by auction, and that the exception is taken that the defender ought not to be condemned unless the thing he has purchased has been delivered to him, the exception is good; but if it was one of the conditions of sale that there should be no delivery until payment of the price, the

§ 126a. A great mass of accounts and other documents (on wax tablets) relating to the auction business of an *argentarius* in the years 53-62

*p. C.* were discovered at Pompeii in 1875, and have since been published; see Petra, *Tavolette*, etc.

- argentarius adiuvatur: AVT SI PRAEDICTVM EST NE ALITER  
EMPTORI RES TRADERETVR QVAM SI PRETIVM EMPTOR <sup>1</sup> SOLVERIT.
- 127 Interdum autem euenit ut rursus replicatio, quae prima facie  
iusta sit, inique reo noceat; quod cum accidit adiectione opus  
128 est adiuvandi rei gratia, quae duplicatio uocatur. Et si  
rursus ea prima facie iusta uideatur, sed propter aliquam  
causam inique actori noceat, rursus ex [*contrario alia*]<sup>1</sup> adiec-  
tione opus est qua actor adiuvetur, quae dicitur triplicatio.
- 129 Quarum omnium adiectionum usum interdum etiam ulterius  
quam diximus uarietas negotiorum introduxit.
- 130 Videamus etiam de praescriptionibus quae receptae sunt  
131 pro actore. Saepe enim ex una eademque obligatione  
aliquid iam praestari oportet, aliquid in futura praestatione  
est, ueluti cum in singulos annos uel menses certam pecuniam  
stipulati fuerimus: nam finitis quibusdam annis aut mensibus,  
huius quidem temporis pecuniam praestari oportet, futurorum  
autem annorum sane quidem obligatio contracta intellegitur,

- auctioneer may have this replication: 'or if it was announced  
previous to the sale that the thing would not be delivered  
127 to the purchaser until he had paid the price.' But it some-  
times happens that a replication, though it in turn may *prima*  
*facie* seem just, yet operates inequitably against the defender;  
in that case an additional clause is added on his account,  
128 which gets the name of duplication. If this again appear  
*prima facie* to be just, but for any reason be really inequit-  
able to the pursuer, still another clause is necessary on the  
129 other side for his relief, which is called a triplication. And  
the employment of such interjected clauses may go even  
further than we have indicated, if the circumstances of the  
case require it.

- 130 Let us also consider the nature of the prescriptions employed  
131 for the sake of pursuers. It often happens that out of one  
and the same obligation there arises both an immediate and a  
future claim, as when we have stipulated for a certain sum  
yearly or monthly; at the end of the first year or month the  
payment in respect of it then becomes due, but there is not  
yet any claim for the payments applicable to future years,

<sup>1</sup> For *emptor*, as in the ms., Hu.  
substitutes *emptae rei*.

§ 127. § 1, tit. I. afd.

§ 128. § 2, tit. I. afd.

<sup>1</sup> The ms. has merely *ex*; K. u.  
S. delete it; Hu reads *ex* [*ea*], and

in former editions *contra*. *Alia* is  
from the Inst.

§ 129. Comp. § 3, tit. I. afd.

§ 130. Comp. Cic. *de fin.* i, 1, § 3.

§ 131. Comp. Cic. *de orat.* i, 37, §  
168.

praestatio uero adhuc nulla est; si ergo uelimus id quidem quod praestari oportet petere et in iudicium deducere, futuram uero obligationis praestationem in integro relinquere, necesse est ut cum hac praescriptione agamus: EA RES AGATVR CVIVS REI DIES FVIT; alioquin si sine hac praescriptione egerimus ea scilicet formula qua incertum petimus, cuius intentio his uerbis concepta est: QVIDQVID PARET NVMERIVM NEGIDIVM AVLO AGERIO DARE FACERE OPORTERE,<sup>1</sup> totam obligationem, id est etiam futuram, in hoc iudicium deducimus, et *quae* ante  
 131a tempus obligatio — — — — —.<sup>2</sup> Item si uerbi gratia ex empto agamus *ut* nobis fundus mancipio detur, debemus *hoc modo*<sup>1</sup> *praescribere*: EA RES AGATVR DE FVND O MANCIPANDO, ut postea, si uelimus uacuam possessionem nobis

although an obligation for them is held to have been contracted. If therefore we desire to sue for what is now payable, and submit our claim in respect of it to judicial decision, and at the same time to reserve entire our future claims under the same obligation, we must have a prescription in these terms: 'The matter of action is what is now payable;' if this prescription be omitted, and our formula be an indefinite one, with an *intentio* in these terms: 'whatever it appears that in respect thereof Numerius Negidius ought to give to or do for Aulus Agerius,' the whole obligation, even as it affects the future, is submitted to the judge, and so much of it as is sued for prematurely [*can neither be included in the*  
 131a [*condemnation nor sued for afresh when the term of payment has arrived*]. In like manner if, for example, we are suing by an *actio ex empto* for mancipatory conveyance to us of lands we have bought, we ought to have a prescription in this way: 'The matter of action is the mancipation of the lands in question,' so that, if we afterwards desire delivery of vacant

<sup>1</sup> Comparing this with the formula in the next par., it would appear that the *intentio* of an *incerti conditio* might be either in the form *quidquid paret d. f. oportere*, or in that of *quidquid d. f. oportet*.

<sup>2</sup> About a line and a half (p. 233, ll. 4, 5) illegible. Gou. proposes—et *quae* ante tempus obligatio in iudicium fuit deducta consumpta est, quo fit ut postea permissum non sit de eadem re denuo agere. Hu. has—et quod ante tempus obligationis emensum petitio nullo modo fieri ex ea potest nec est permissa, reliquum

*perdimus*. K. u. S. (footnote) suggest—et *quae* ante tempus obligationis in iudicium deducuntur, ea neque in condemnationem ueniunt neque postea rursus de iis agere potest. M. (K. u. S. p. xxii)—et *quae* ante tempus obligatio in iudicium deducitur, etc., substituting *uenit* and *ea* for the *ueniunt* and *iis* of K. u. S.

§ 131a. Comp. fr. 48, § 7, D. *de aedil. ed.* (xxi, 1).

<sup>1</sup> K. u. S. have *ita*; but, according to Stud., there are four illegible letters in the ms. (*hocm*).



tradi, — — — — —<sup>2</sup> sumus, totius illius iuris obligatio illa *incerta* actione: QUIDQVID OB EAM REM NVMERIVM NEGIDIVM AVLO AGERIO DARE FACERE OPORTET, *propter*<sup>3</sup> *intentionem* consumitur, ut postea nobis agere uolentibus de uacua possessione tradenda nulla supersit actio. *Praescriptiones sic* appellatas esse ab eo quod ante formulas praescribuntur plus quam manifestum est.

132 Sed his quidem temporibus, sicut supra<sup>1</sup> quoque notauimus, omnes praescriptiones ab actore proficiscuntur: olim autem quaedam et pro reo opponebantur: qualis illa erat praescriptio: EA RES AGATVR SI IN EA<sup>2</sup> PRAEIVDICIVM HEREDITATI NON FIAT, quae nunc in speciem exceptionis deducta est,<sup>3</sup> et locum habet cum petitor hereditatis alio genere iudicii prae-

possession, [*we may sue afresh for it by a new action; if we neglect to have such a prescription*], all that we can claim under the obligation is exhausted by [joinder of issue upon] the indefinite formula—‘whatever in respect thereof Numerius Negidius is bound to give to or do for Aulus Agerius;’ and, should we afterwards want delivery of vacant possession, no  
132 action remains to us for obtaining it. That prescriptions are so called because they are prefixed to the formulae is more than manifest.

133 At the present day, as already observed, all prescriptions originate with the pursuer. But at one time there were some prefixed for the benefit of the defender. Of this sort was the prescription: ‘This action may proceed provided the question of inheritance be not thereby prejudged.’ But now it is converted into a sort of exception, employed when there is danger that the claimant of an inheritance, suing [not by *hereditatis petitio* but] by some other action, say for some specific article, may get a decision on the question of succession; for it would be unfair [*that a judgment in reference to some trifle should*

<sup>2</sup> Rather more than a line illegible. Gou. suggests—*contra uenditorem agere possimus eadem actione; alioquin si non praescribimus, totius, etc.* K. u. S. suggest—*uel tradita ea de euictione nobis caueri, iterum ex empto agere possimus. nam si praescribere [obliti] sumus, etc.* Hu. supplies—*eius tradendae causa ex stipulatu uel ex empto agere supersit; [nam si] obliti sic praescribere sumus, etc.*

<sup>3</sup> So Bekker (*Akt. i.*, p. 343), and preferable to the *per* of K. u. S. and Hu. Some eds. read *per litis contestationem*. See iii, §§ 180, 181, and note.

§ 133. Comp. § 108, note.

<sup>1</sup> See § 130.

<sup>2</sup> K. u. S. *si in ea re*; Hu. *si ea re*.

<sup>3</sup> See an example of this sort of exception in fr. I, § 1, D. *fam. erc.* (x, 1).

iudicium hereditati faciat, ueluti cum singulas res *petat*; esset enim iniquum — — — — —<sup>4</sup>

- 134 — — — — —<sup>1</sup> intentione formulae (*de iure quaeritur*),<sup>2</sup> id est cui dari oportet; et sane domino dari

[*prejudge the general question of inheritance*]. — — — — —

- 134 — — — — — in the intention of the formula the question that is raised is one of right, namely, who it is

<sup>4</sup> P. 234 of the ms. is entirely illegible. Bl. thought he could make out, as the last words of p. 233, *per unius rei*; and, utilising these, K. u. S. suggest as the completion of the par.—est enim iniquum *per unius rei petitionem hereditati praeiudicium fieri*. Hu. suggests—est enim iniquum *per unius rei forte minimae rei petitionem, de qua apud unum iudicem agitur, de tota hereditate deferitur* (comp. l. 12, pr. C. de her. pet. iii, 31). *Et olim quidem, quamdiu ex hac causa praescribatur, iudex principaliter de hoc cognoscebat, an hereditati praeiudicium fieret; quod si pronunciauerat, iudicium de singulis rebus petitis nullum erat, ideoque finita de hereditate quaestione, actor qui uicerat denuo eas petere poterat. Nunc uero cum in speciem exceptionis haec praescriptio deducta sit, nisi actor obiecta ea actionem differat, rem perdit, quia reus, si praeiudicium fieri probauerit, absolvitur, et iterum petenti actori nocet exceptio rei iudicatae.*

- § 134. See note 4 to last par. It is possible that Gai. proceeded to give one or two other illustrations of prescriptions that had formerly been prefixed for the benefit of defenders (see § 108, note). It is clear at all events that he passed to prescriptions that may be said to have been in the interest of both parties, and intended to give notice of some point in the pursuer's case which the structure of the formula would otherwise have left undisclosed.

Pages 235 and 236 of the ms. are not palimpsest. They constitute the leaf that was published by Scipio Maffei in 1732.

<sup>1</sup> From what is extant of the par.

Hu. surmises that if a stipulation unusual in its character, say for one or other of two things of which the stipulant had the choice, had been contracted by a slave,—and such a stipulation, like every other, made his owner creditor, and entitled him to sue in his own name,—it was necessary to set forth the fact of the slave's agency in a *praescriptio*, there being no room for it in the *intentio*. Borrowing an illustration from fr. 141, pr. D. de V. O. (xlv, 1), he supposes a slave to have stipulated for 'this or that, which I please;' and proceeds to suggest that when the owner came to sue it would be necessary for him to have a formula with a prescription in terms like these: '*Ea res agatur, quod Stichus Auli Agerii seruus de Numerio Negidio stipulatus est. si paret Numerium Negidium Aulo Agerio decem milia dare oportere*;' and he thinks that Gai., having given some such illustration, proceeded thus: *itaque in intentione formulae, etc.*

But it is by no means clear that it was only when there was something unusual in a slave's stipulation that a *praescriptio* was required; there could not logically be any more need of it when his choice was founded on, than when the action was in virtue of a stipulation by him in the simplest of forms. It is possible therefore that there was a prescription in every case in which the stipulation sued upon had been by a slave or other party subject to the *ius* of the individual who thereby became creditor in the contract (iii, 163); and this seems to be the opinion of K. u. S.

<sup>2</sup> So Hu.; and the reading, judged by the context, is reasonable: ac-

- oportet quod seruus stipulatur; at in praescriptione de *facto*<sup>3</sup> quaeritur, quod secundum naturalem significationem uerum  
 135 esse debet. Quaecumque autem diximus de seruis, eadem de ceteris quoque personis quae nostro iuri subiectae sunt dicta intellegemus.
- 136 Item admonendi sumus, si cum ipso agamus qui incertum promiserit, ita nobis formulam esse propositam ut praescriptio inserta sit formulae loco demonstrationis, hoc modo: INDEX ESTO. QVOD AVLVS AGERIVS DE NVMERIO NEGIDIO *INCERTVM STIPVLATVS EST*, CVIVS REI DIES FVIT, QVIDQVID OB EAM REM NVMERIVM NEGIDIVM AVLO AGERIO DARE FACERE OPORTET et  
 137 reliqua. Si<sup>1</sup> cum sponsore aut fideiussore agatur, praescribi solet in persona quidem sponsoris hoc modo: EA RES AGATVR QVOD AVLVS AGERIVS DE LVCIO TITIO *INCERTVM STIPVLATVS EST*, QVO NOMINE NVMERIVS NEGIDIVS SPONSOR EST, CVIVS REI DIES

that is entitled to payment; and undoubtedly it is the owner that is entitled to payment in virtue of his slave's stipulation: but in the prescription the question is as to facts, which ought to be stated according to their natural [rather  
 135 than their jural] meaning. What has been said of slaves applies equally to other persons subject to our *potestas*.

- 136 We must further keep in mind that if we are proceeding against an individual who himself by stipulatory promise has engaged to us indefinitely, we can have our formula so worded as to put the prescription in place of the demonstration, thus: 'So and so be judge. Whereas Aulus Agerius stipulated with Numerius Negidius for something indefinite, whose term of payment ~~has arrived~~, whatever in respect thereof Numerius Negidius ought to give to or do for Aulus  
 137 Agerius,' and so on. But if the proceedings be against a *sponsor* or *fideiussor*, there is in the case of the former a prescription in these terms: 'This is the matter of action, —that Aulus Agerius stipulated with Lucius Titius for something indefinite, on account whereof Numerius Negidius became sponsor, and whose term of payment ~~has arrived~~;' and

*is part*  
 according to the natural meaning of the words, it was the slave that stipulated; according to the legal one, it was his owner.

<sup>3</sup> So Savigny and all subsequent eds.; the MS. has *pacto*.

- § 136. For *incertum stipulatus est* the MS. has *icertestipem*; the reading is that of G., followed by all eds.

except Hu., who converts the final *m* into *modo*.

- § 137. The prescriptions in this paragraph served a twofold purpose; they indicated the origin of the claim, and limited it to what had fallen due.

<sup>1</sup> So the MS.; Hu. *quod si*; P. *at si*.

EVIT; in persona uero fideiussoris: EA RES AGATVR QVOD NVMERIVS NEGIDIVS PRO LVCIO TITIO INCERTVM FIDE SVA ESSE IVSSIT, CVIVS REI DIES EVIT; deinde formula subicitur.

138 Superest ut de interdictis dispiciamus.

139 Certis igitur ex causis praetor aut proconsul principaliter<sup>1</sup> auctoritatem suam finiendis controuersiis *interponit*; <sup>2</sup> quod tum maxime facit cum de possessione aut quasi possessione inter aliquos contenditur; et in summa aut iubet aliquid fieri aut fieri prohibet: formulae autem *et uerborum*<sup>3</sup> *conceptiones* quibus in ea re utitur interdicta *decretaque*<sup>4</sup> [*uocantur*].<sup>5</sup>

140 Vocantur autem decreta cum fieri aliquid iubet, ueluti cum praecipit ut aliquid exhibeatur aut restituatur; interdicta uero cum prohibet fieri, uelut cum praecipit ne sine *uitio* possidenti uis fiat,<sup>1</sup> neue in loco sacro aliquid fiat:<sup>2</sup> unde

in the case of a *fideiussor* it will be thus worded: 'The matter of action is this,—that Numerius Negidius gave his fidejussory undertaking for Lucius Titius for something indefinite, whose term of payment ~~has arrived~~; and then will come the formula.

138 The next matter for consideration is that of interdicts.

139 There are certain cases in which the praetor or proconsul peremptorily interpones his authority with a view to bring disputes to an end, but most frequently when these are about possession or quasi-possession. To state the matter shortly, he either orders or prohibits something to be done; and the formulae and styles he makes use of for the purpose are called

140 interdicts and decrees. They are called decrees when he orders something to be done, as when he commands that something shall be produced or restored; interdicts, when he prohibits something to be done, as when he commands that violence shall not be used towards an individual in non-vituous possession, or that a sacred place shall not be dese-

§§ 138-170. Comp. tit. I. *DE INTERDICTIS* (iv, 15).

§ 139. Comp. pr. tit. I. *afd.*

<sup>1</sup> The ms. has *principaliter*; there are different opinions about its meaning.

<sup>2</sup> So all the later eds.; the ms. has *proponit*.

<sup>3</sup> So Hu. and most recent eds.; the ms. has *uerborum et*.

<sup>4</sup> Only the first three letters

legible in the ms., with just sufficient space for the remainder.

<sup>5</sup> K. u. S. are of opinion that something more has dropped out of the text than the *uocantur*, and that it probably ran: *interdicta* [*uocantur*, *uel accuratius interdicta*] *decretaque*.

§ 140. <sup>1</sup> Comp. § 1, tit. I. *afd.*

<sup>2</sup> Comp. § 148.

<sup>3</sup> Comp. tit. D. *ne quid in loco sacro fiat* (xliii, 6).



- omnia interdicta aut restitutoria aut exhibitoria aut prohibi-  
 141 toria uocantur.<sup>3</sup> Nec tamen cum quid iusserit fieri aut fieri  
 prohibuerit statim peractum est negotium, sed ad iudicem  
 recuperatoresue *itur*, et ibi editis formulis quaeritur an aliquid  
 aduersus praetoris edictum factum sit, uel an factum non sit  
 quod is fieri iusserit. et modo cum poena agitur, modo sine  
 poena: cum poena, ueluti cum per sponsionem agitur, sine  
 poena, ueluti cum arbiter petitur; et quidem ex prohibitoriis  
 interdictis semper per sponsionem agi solet, ex restitutoriis  
 uero uel exhibitoriis modo per sponsionem, modo per for-  
 mulam agitur quae arbitraria uocatur.
- 142 Principalis igitur diuisio in eo est quod aut prohibitoria  
 143 sunt interdicta aut restitutoria aut exhibitoria. Sequens in  
 eo est diuisio quod uel adipiscendae possessionis causa con-  
 parata sunt uel retinendae<sup>1</sup> uel recipiendae.
- 144 Adipiscendae possessionis causa interdictum accommodatur  
 bonorum possessori,<sup>1</sup> cuius principium est *QUORVM BONORVM*;  
 eiusque uis et potestas haec est, ut quod quisque ex his bonis

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crated. Hence every interdict is said to be either restitutory,  
 141 or exhibitory, or prohibitory. But the matter is not at  
 once at an end when he has pronounced his order or prohibi-  
 tion; it then goes to a judge or to recuperators, and, formulae  
 having been adjusted, the question is tried whether or not  
 anything has been done in contravention of his prohibition, or  
 whether or not there has been failure to do what he has  
 ordered to be done. And this subsequent procedure is some-  
 times penal, sometimes not: penal, when the proceedings are  
 by sponsion; non-penal, when an arbiter is demanded. The  
 procedure following upon a prohibitory interdict is always by  
 sponsion; that following on a restitutory or exhibitory one  
 may be either by sponsion or by an arbitrary formula.

142 The principal division then of interdicts is this,—that they  
 143 are either prohibitory, restitutory, or exhibitory. The next  
 division is that they are provided as a means either of acquir-  
 ing possession, or of retaining it, or of recovering it.

144 There is an interdict for acquiring possession, beginning  
 with the words *quorum bonorum*, provided for a *bonorum*  
*possessor*; its force and effect is that anything belonging to

<sup>3</sup> Comp. § 142.

§ 141. Comp. §§ 162-170; Vlp. v, §§

1, 2.

§ 142. Comp. § 140; § 1, tit. I. afd.

§ 143. Comp. § 2, tit. I. afd.

<sup>1</sup> After *retinendae* the MS. has  
*possessionis causa interdictum*.

§ 144. § 3, tit. I. afd.

<sup>1</sup> Comp. iii, 34.

quorum possessio alicui data est, si<sup>2</sup> pro herede aut pro possessore<sup>3</sup> possideat, id ei cui bonorum possessio data est restituatur. pro herede autem possidere uidetur tam is qui heres est quam is qui putat se heredem esse; pro possessore is possidet qui sine causa aliquam rem hereditariam, uel etiam totam hereditatem, sciens ad se non pertinere, possidet. ideo autem adipiscendae possessionis uocatur quia ei tantum utile est qui nunc primum conatur adipisci rei possessionem; itaque si quis adeptus possessionem amiserit, desinit ei id  
 145 interdictum utile esse. Bonorum quoque emptori similiter proponitur interdictum, quod quidam possessorium uocant.  
 146 Item ei qui publica bona emerit eiusdem condicionis interdictum proponitur, quod appellatur sectorium, quod sectores  
 147 uocantur qui publice bona mercantur. Interdictum quoque quod appellatur Saluianum adipiscendae possessionis [*causa*] comparatum est, eoque utitur dominus fundi de

the deceased's estate that may at the moment be in the possession of another either *pro herede* or *pro possessore* must be restored to him to whom the possession has been granted. He is regarded as possessing *pro herede* not only who is heir but also who [erroneously] believes himself to be so; he possesses *pro possessore* who, without any title, is in possession of the whole or part of an inheritance, knowing that it does not belong to him. And the interdict in question is said to be for acquiring possession, because it is of use only to a person endeavouring to obtain possession for the first time; for if he have lost it after once obtaining it, such an interdict  
 145 ceases to be of any service to him. A similar interdict is provided for the purchaser of a bankrupt's estate, which by  
 146 some is termed *interdictum possessorium*. One of the same sort, under the name of *interdictum sectorium*, is propounded for the purchaser of a confiscated estate at public sale; so called because *sector* is the name given to a person trafficking  
 147 in that way. What is known as the Salvian interdict is also one for acquiring possession; it is employed by a landlord for

<sup>2</sup> K. u. S. and Hu. delete *si*.

<sup>3</sup> On the strength of fr. 1, D. *quor. bonor.* (xliii, 2), which recites the words of the edict, Hu. interpolates *possidet, doloue fecit quo minus*, substituting *possideret* for the *possideat* of the ms.

§ 145. Comp. iii, §§ 77-80.

§ 146. Comp. Ps.-Ascon. in II. Verr. i, 52 (Bruns, p. 292). The sale *sub hasta* of the forfeited estate of a condemned criminal, of an inheritance that had fallen to the fisc, etc., was called *sectio*.

§ 147. § 3, tit. I. afđ.

rebus coloni quas is pro mercedibus fundi pignori futuras pepigisset.

- 148 Retinendae possessionis causa solet interdictum reddi cum ab utraque parte de proprietate alicuius rei controuersia est, et ante quaeritur uter ex litigatoribus possidere et uter petere debeat; cuius rei gratia comparata sunt VTI POSSIDETIS et
- 149 VTRVBI. Et quidem VTI POSSIDETIS interdictum de fundi uel aedium possessione redditur, VTRVBI uero de rerum mobi-
- 150 lium possessione. Et si quidem de fundo uel aedibus interdicitur, eum potiolem esse praetor iubet qui eo tempore quo interdictum redditur nec ui nec clam nec precario ab aduersario possideat; si uero de re mobili, eum potiolem esse iubet qui maiore parte eius anni<sup>1</sup> nec ui nec clam nec precario ab aduersario possederit; idque satis ipsis uerbis interdic-
- 151 torum significatur. Sed in VTRVBI interdicto non *solum sua cuique*<sup>1</sup> *possessio prodest*, sed etiam alterius quam iustum est

obtaining possession of effects of his farm-tenant which he has bargained shall stand hypothecated for the rent.

- 148 An interdict for retaining possession is granted when there are two parties disputing about the property of a thing, and there is a prior question which of them ought to be regarded as in possession of it, and which ought to stand pursuer in the action for its recovery; for deciding this matter the interdicts
- 149 *uti possidetis* and *utrubi* have been devised. The first is employed when the question is about the possession of land or of a house; the second when it is about the possession of
- 150 moveables. When the controversy is about land or about a house the praetor gives the preference to him who is in possession at the moment of the interdict, and that, so far as his opponent is concerned, neither violently, clandestinely, nor on sufferance; but if it be about a moveable, he is preferred who has been in possession of it for the greater part of the year, and that neither by violent, clandestine, nor precarious exclusion of his adversary, all as indicated sufficiently in the words of
- X 151 the edict. But in the interdict *utrubi* it is not merely a man's own possession that counts to him, but also any other person's that can rightly be regarded as accessory; as, for example, that of an individual to whom he has succeeded as

§§ 148, 149. Comp. § 160; Paul. v, 6, § 1; §§ 4, 4a, tit I. afd.; Th. iv, 15, § 3.

§ 150. Comp. § 160; § 4, tit. I. afd.

<sup>1</sup> Comp. fr. 156, D. de V. S. (l, 16).

§ 151. Comp. fr. 14-16, D. de diu. temp. pr. (xliv, 3); fr. 13, §§ 12, 13, D. de adq. u. am. poss. (xli, 2).

<sup>1</sup> The contraction in the ms. is qq.

x *respective interdicts*

- ei accedere, uelut eius cui heres extiterit, eiusque a quo emerit uel ex donatione aut dotis nomine acceperit: itaque si nostrae possessioni iuncta alterius iusta possessio exuperat aduersarii possessionem, nos eo interdicto uincimus. nullam autem propriam possessionem habenti accessio temporis nec datur nec dari potest: nam ei quod nullum est nihil accedere potest: sed et si uitiosam habeat possessionem, id est aut ui aut clam aut precario ab aduersario adquisitam, *non datur accessio*;
- 152 *nam ei* [possessio] sua nihil prodest. Annus autem retrorsus numeratur: itaque si tu uerbi gratia VIII mensibus possederis prioribus et ego VII posterioribus, ego potior ero, quod *trium priorum*<sup>1</sup> mensium possessio nihil tibi in hoc interdicto prodest,
- 153 quia alterius anni possessio est. Possidere autem uidemur non solum si ipsi possideamus sed etiam si nostro nomine aliquis in possessione sit, licet is nostro iuri subiectus non sit, qualis est colonus et inquilinus: per eos quoque apud quos deposuerimus, aut quibus commodauerimus, aut quibus gra-

- heir, or from whom he has purchased a thing, or received it as a gift or by way of dowry: consequently if the rightful possession of another, taken along with our own, have exceeded that of our opponent, we are successful in this interdict. But no accession of time is or can be given to a person who has no possession of his own; for there can be no accession to a nullity. Nor can there be any accession in favour of a party whose own possession is vitious, *i.e.* acquired from his opponent violently, clandestinely, or in defiance of the recal of a grant during pleasure; for his own possession [in such
- 152 a case] is of no avail to him. The year is reckoned backwards: therefore if you have been in possession say for eight months before me, and I have possessed for the last seven, I must prevail; for the three first months of your possession do not count to you so far as this interdict is concerned, seeing
- 153 the possession during them was in a different year. We are regarded as possessing not only when we do so ourselves, but when any person is in possession in our name, even though he be not subject to our *potestas*, but merely a tenant say, either of a farm or of a house. We are also regarded as possessing by those with whom we have deposited a thing or to whom we have lent it, as also by those to whom we have

§ 152. Comp. Paul. v, 6, § 1; Th. iv, § 153. § 5, tit. I. afd. Comp. Gai. in 15, § 4. fr. 9, D. de adq. vel amitt. poss.

× <sup>1</sup> The ms. has *trumporum*.

1 The interdict was a praetorian remedy, & the praetor dealt only with what had happened during his own year of office which (Monum. in M. and R. om. alt. 1.493) from the year 601/153 downwards began on 1<sup>st</sup> January.



*tuitam habitationem praestiterimus*<sup>1</sup> ipsi possidere videmur: et hoc est quod uulgo dicitur retineri possessionem posse per quemlibet qui nostro nomine sit in possessione. quin etiam plerique putant animo quoque (*retineri*) *possessionem*, [*id est [ut quamuis neque ipsi simus in]*<sup>2</sup> *possessione neque nostro nomine alius, tamen si non relinquendae possessionis animo, sed postea reuersuri inde discesserimus, retinere possessionem uideamur. Apisci uero possessionem per quos possimus secundo commentario rettulimus;*<sup>3</sup> nec ulla dubitatio est quin animo possessionem apisci non possimus.<sup>4</sup>

- 154 Reciperandae possessionis causa solet interdictum dari si quis ex possessione [*fundi uel aedium*]<sup>1</sup> ui deiectus sit: nam ei proponitur interdictum cuius principium est VNDE TV ILLVM VI DEIECISTI, per quod is qui deiecit cogitur ei restituere rei possessionem, si modo is qui deiectus est nec ui nec clam nec

granted a [*usufruct, or a right of use or*] gratuitous habitation; and this is what is meant by the common saying that possession may be retained through any person that is in possession in our name. Nay, most jurists go so far as to think that it may be retained by a mere effort of will, *i.e. that although neither we ourselves are in possession nor yet any other person on our account, still, if we have left a place without any intention of relinquishing the possession of it, but really meaning to return, we are to be regarded as retaining possession.* In our Second Commentary we have explained who they are through whom we may acquire possession; there has never been any doubt that for such acquisition a mere effort of will is ineffectual.

- 154 An interdict is granted for recovering possession when a man has been forcibly ejected [*from his land or house*]; to meet his case there is one published beginning with the words *unde tu illum ui deieccisti*, whereby the ejector is compelled to restore the possession, provided the party ejected was not [at the time] possessing as the result of violent, clandestine, or precarious taking from the ejector himself; for he who has

<sup>1</sup> So Bk. and K. u. S. The ms. has *rtituerimus*, and then a repetition of *aut quibus gratuitam habitationem*. This induces Hu. to read *praestiterimus, aut quibus [usum-fructum uel usum con]stituerimus*.

<sup>2</sup> Borrowed from the Inst., with the necessary grammatical alterations.

<sup>3</sup> Comp. ii, §§ 89-95.

<sup>4</sup> Comp. Paul. v, 2, § 1.

§ 154. Comp. Cic. *pro Caec.* xi, §§ 31, 32; *pro Tull.* §§ 44, 45; Paul. v, 6, §§ 4-8; fr. 1, pr. D *de ui* (xliii, 16); § 6, tit. I. afd.

<sup>1</sup> These three words are from the Inst.

precario *possederit* (*ab altero*), cum qui a me ui aut clam aut  
 155 precario possidet impune *deici potest*.<sup>2</sup> Interdum tamen *etsi*  
*eum* ui deiecerim qui a me ui aut clam aut precario posse-  
 derit, cogor ei restituere possessionem, ueluti si armis eum ui  
 deiecerim: nam propter atrocitatem delicti in tantum patior  
*animaduersionem*<sup>1</sup> *ut* omni modo *debeam ei restituere posses-*  
*sionem*. armorum autem appellatione non solum scuta et gla-  
 156 Tertia diuisio interdictorum in hoc est, quod aut simplicia  
 157 sunt aut duplicia. *Simplicia sunt ueluti in* quibus alter  
 actor alter reus est, qualia sunt omnia restitutoria aut  
 exhibitoria: nam actor est qui desiderat aut exhiberi aut  
 restitui, reus is est a quo desideratur ut exhibeat aut resti-  
 158 tuat. Prohibitorium autem interdictorum alia duplicia,  
 159 alia simplicia sunt. *Simplicia sunt ueluti quibus prohibet*

taken possession from me by violence or clandestinity, or in  
 defiance of my recal of a grant during pleasure, may be ejected  
 155 by me with impunity. Yet sometimes, if I have forcibly  
 ejected a party who had taken possession from me violently,  
 clandestinely, or precariously, I will be compelled to restore  
 the possession to him,—then, namely, when I have ejected  
 him by force of arms; on account of the gravity of the offence  
 I have to suffer punishment at least to this extent, that I  
 must in any case reinstate him in possession. And under the  
 word ‘arms’ we are to understand not only shields, swords, and  
 helmets, but also sticks and stones.

156 A third division of interdicts is due to the consideration  
 157 that they are either single or double. Those are single in  
 which one party is pursuer, the other defender, as is the case  
 in all the restitutory and exhibitory interdicts; he is pursuer  
 who desires exhibition or restitution, and he defender at whose  
 158 hands exhibition or restitution is required. Of the prohi-  
 159 bitory interdicts some are double, some single. Those, for  
 example, are single in which the praetor forbids the defender

<sup>2</sup> So K. u. S. Hu. reads—*nec pre-*  
*cario [ab eo] possideret; enimuero*  
*eum qui . . . impune deicio*. The  
 final letter is illegible in the ms., and  
 may have been either *t*, which would  
 make the reading *deicitur*, or *o*, as  
 assumed by Hu., or *p* (contraction  
 for *potest*), as assumed by K. u. S.  
 § 155. Comp. refs. in note to last par.;  
 also fr. 3, §§ 2-12, D. *de ui* (xliii, 16).

<sup>1</sup> The ms. has *aonem*; K. u. S.  
 and P. read *patior actionem*; to this  
 Hu. objects, and substitutes *ratio*  
*facti habetur*; but the *patior* of the  
 ms. is quite distinct, though *aonem*  
 is not perfectly certain. See *anim-*  
*aduersio* employed in this sense  
 in fr. 131, § 1, D. *de V. S.* (1,  
 16).

§§ 156-159. Comp. § 7, tit. I. *afd*.

- praetor in loco sacro aut in flumine publico ripae eius aliquid facere reum: nam actor est qui desiderat ne quid fiat, reus is qui aliquid facere conatur. Duplicia sunt velut VTI POSSIDETIS interdictum et VTRVBI: ideo autem duplicia uocantur quia *par* utriusque litigatoris in his condicio est, nec quisquam praecipue reus vel actor intellegitur, sed unusquisque tam rei quam actoris partes sustinet; quippe praetor pari sermone cum *utroque* loquitur: nam summa conceptio eorum interdictorum haec est:<sup>1</sup> VTI NVNC POSSIDETIS, QVOMINVS ITA POSSEDEATIS, VIM FIERI VETO; item alterius:<sup>2</sup> VTRVBI HIC HOMO DE QVO AGITVR<sup>3</sup> MAIORE PARTE HVIVS ANNI FVIT, QVOMINVS IS EVM DVCAT, VIM FIERI VETO.
- 161 Expositis generibus interdictorum sequitur ut de ordine et de exitu eorum dispiciamus; et incipiamus a simplicibus.
- 162 [*Si*] igitur restitutorium vel exhibitorium interdictum redditur, veluti ut restituatur ei possessio qui vi deiectus est, aut

- to go on with any operation in a sacred place, or in a public river, or on its bank; he is pursuer who wishes to prevent it, and he defender by whom it is attempted. Double are such interdicts as the *uti possidetis* and *utrubi*. They are so called because in them the litigants stand on the same footing, neither being regarded as peculiarly pursuer or peculiarly defender, but each holding both characters, inasmuch as the praetor addresses both in exactly the same terms. For, putting them in the briefest possible shape, those interdicts run thus: the first—‘I forbid any violence being done to prevent you two continuing to possess as you do now;’ the second—‘I forbid any violence being done to prevent that one of you with whom the slave in question has been for the greater part of this year from taking said slave away with him.’
- 161 The various sorts of interdicts having been described, we have next to consider the procedure in them, and its issue.
- 162 We shall begin with the single ones. If then a restitutory or exhibitory interdict be granted, ordaining for example that possession be restored to a party who has been forcibly

§ 160. Comp. § 149, and note.

<sup>1</sup> Comp. Fest. v. *Possessio* (Bruns, p. 254); fr. 1, pr. D. *uti possid.* (xliii, 17).

<sup>2</sup> Comp. tit. D. *utrubi* (xliii, 31).

<sup>3</sup> Before *maiore* the ms. has *apud quem*. These words are not in the

formula of the interdict in the Dig. (see last note); I have therefore expunged them as a gloss, which K. u. S., M., and P. also regard them.

§ 161. Comp. § 8, tit. I. afd.

§ 162. Comp. §§ 141, 157.

exhibeatur libertus cui patronus operas indicere uellet,<sup>1</sup> modo sine periculo res ad exitum perducitur, modo cum periculo.

163 Namque si arbitrum postulauerit is cum quo agitur, accipit formulam quae appellatur arbitraria, et iudicis arbitrio, si quid restitui uel exhiberi debeat, id sine periculo exhibet aut restituit et ita absolvitur; quodsi nec restituat neque exhibeat, quanti ea res est<sup>1</sup> condemnatur. sed et actor sine poena experitur cum eo *quem* neque exhibere neque restituere quicquam *oportet*, praeterquam si calumniae iudicium<sup>2</sup> ei oppositum fuerit decimae partis: *quamquam Proculo*<sup>3</sup> *placuit non esse permittendum* calumniae iudicio [*uti*] *ei*<sup>4</sup> qui arbitrum postulauerit, quasi hoc ipso confessus uideatur restituere se uel exhibere debere: sed alio iure utimur; et recte; *potius*

ejected, or that a freedman be produced upon whom his patron wishes to impose certain duties of service, the matter is brought to an issue sometimes with and sometimes without

163 any risk being incurred. For, if the defender have demanded a reference to an arbiter, he obtains what is called an arbitrary formula; and if, on the discretionary order of the judge, he restores or exhibits that which he is held to be in law bound to restore or exhibit, he does so without incurring any penalty, and is at once absolved; while if he fail to restore or exhibit, he is simply condemned in what the pursuer can show himself entitled to as damages. The pursuer also litigates without any risk with a party who is not bound to exhibit or restore anything, unless a *iudicium calumniae*, concluding for a tenth part of the value of the cause, be raised against him. Proculus, indeed, was of opinion that a defender who had demanded an arbiter could not be allowed a *calumniae iudicium*, as his application for an arbiter involved an admission that he was bound to restore or exhibit; but we follow a different practice, and rightly; for his application for an

<sup>1</sup> Comp. fr. 2, § 1, *de interd.* (xliii, 1); fr. 13, § 2, *D. de oper. lib.* (xxxviii, 1).

§ 163. Comp. Vlp. Inst. fr. 5.

<sup>1</sup> Comp. fr. 2, § 2, *D. quod leg.* (xliii, 3); fr. 3, § 11, *D. de tab. exhib.* (xliii, 5); fr. 6, fr. 15, *D. de ui* (xliii, 16). *Quanti res est* often means the market value of the thing in dispute (fr. 179, fr. 193, *D. de V. S.* l. 16); but here, to judge by the passages referred to, it means

what is commonly expressed by *id quod interest*—damages, the amount of the pursuer's loss imputable to the defender.

<sup>2</sup> Comp. §§ 175, 181.

<sup>3</sup> Comp. i, 196, note 1.

<sup>4</sup> So Gou.; K. u. S. have *placuit denegandum calumniae iudicium ei*; Hu. *placuisse dicitur prohibendum calumniae iudicio esse eum*; P. follows Gou.



- enim ut modestiore uia litiget*<sup>5</sup> arbitrum quisque petit quam  
 164 *quia confitetur*.<sup>6</sup> [*ceterum*] obseruare debet is qui uult arbitrum petere ut statim petat antequam ex iure exeat, id est antequam a praetore *discedat*: sero enim petentibus non indulgetur.  
 165 Quod si arbitrum non petierit, sed tacitus de iure exierit, cum periculo res ad exitum perducitur: nam actor prouocat aduersarium sponsione ni contra edictum praetoris non exhibuerit aut non restituerit; ille autem aduersus sponsionem aduersarii restipulatur; deinde actor quidem sponsionis *formulam edit* aduersario, ille huic inuicem restipulationis: sed actor sponsionis — — —<sup>1</sup> et aliud iudicium de re restituenda uel exhibenda, ut si sponsione *uicerit*, nisi ei res exhibeatur aut restituatur,<sup>2</sup> — — — — —.

- arbitr should be imputed not so much to any admission on his part, as to his desire to litigate by the less pretentious  
 164 procedure. A defender who desires to have an arbitr appointed must take care to apply for him at once, and before withdrawing from the presence of the praetor *in iure*; if the demand be not made until a later stage it will not be granted.  
 165 If he have not made any such application, but have left the court without speaking, the matter proceeds to its issue at his risk; for the pursuer challenges him with a sponsion upon the question whether it is not in defiance of the praetor's interdict that he has failed to exhibit or restore, and the defender restipulates as against this sponsion. The parties then have formulae adjusted upon their respective sponsion and restipulation, the pursuer *getting words added to his formula* containing a remit to the judge upon the main question of restitution or exhibition; so that, if he is successful on his sponsion, and exhibition or restitution is still refused, [*the judge has power to condemn the defender not only in the amount of the sponsion and restipulation, but also in damages*]. — — — — —.

<sup>5</sup> So K. u. S. and Hu.; Gou. has *potius enim ut per modestiorem actionem litiget*. The word *modestius* is used in this sense by Pap. in fr. 25, § 1, D. *de pec. con.* (xiii, 5).

<sup>6</sup> So Gou. and K. u. S.; Hu. has *quia causae non fedit*; P. *quia convictus sit*.

§ 164. *Ceterum* added by Hu. and adopted by P.; K. u. S. have *obseruare* [autem].

§ 165. Cp. Cic. *pro Caec.* viii, 23, xxxi,

91; *pro Tull.* § 53; Gai. iv, 141.

<sup>1</sup> In this lacuna Bk., K. u. S., and Hu. insert *formulae subicit*; but these words do not correspond to the traces visible in the ms.

<sup>2</sup> P. 241 of the ms. ends with *restituatur*; p. 242 is entirely illegible; and on p. 243 not half-a-dozen words are decipherable. The words in ital. in the translation probably represent generally the sense of the final words of this par.

166 — — — — — fructus licitando,<sup>1</sup> *is tantisper in possessione constituitur*, si modo aduersario suo fructuaria stipulatione (*cauerit*), cuius uis et potestas *haec est, ut si contra eum de possessione pronuntiatum fuerit, eam summam aduersario soluat*. Haec autem licendi contentio fructus licitatio uocatur scilicet quia — — — — —.<sup>2</sup> *postea alter alterum sponsione prouocat quod*<sup>3</sup> aduersus edictum praetoris

166 — — — — —. [*Interdict having been pronounced, and the parties having made pretence of violence towards each other, then, in order to prevent any real and serious contest about the interim enjoyment of the land or house in question while the proceedings are in dependence, the praetor requires them to bid for it; and he who is successful*] in the bidding is awarded the interim possession, provided he has given security to his opponent by a *fructuaria stipulatio*, whose effect is that he must pay to the latter the sum promised in the event of judgment being against him, the promiser, on the main question of possession. This bidding and counter-bidding is called *fructus licitatio*, bidding for the fruits, because [*neither of the bidders gets the thing itself, but only the right to possess it and draw the fruits and profits of it in the meantime*]. Afterwards each challenges the other with a sponson, on the suggestion

§ 166. It is presumable that, in the remainder of pp. 242, 243, Gai., having finished his observations on the procedure in the single interdicts, must have commenced to explain that followed in the double ones,—the matter dealt with in pp. 244–246. The illegibility of pp. 242, 243 is particularly to be regretted; if they could be deciphered they would probably throw some light on the *uis ex conuentu*, that followed the interdict *uti possidetis*, and that is incidentally mentioned in § 170. For, notwithstanding the final words of that interdict, *uim fieri ueto*, the very first thing the parties did, and were expected to do, was to offer (or pretend to offer) violence to each other in regard to the possession. It was only thus that a question could be raised for the judge,—‘both parties have done violence; which of them is it that has done it in defiance of the interdict,—that has done it in disturbance of the possession previously existing?’

<sup>1</sup> The first word or two on p. 244

are illegible. Krueg. (*Krit. Vers.* p. 92) suggests *et uter eorum uicerit fructus licitando*, etc.; but these words do not correspond to the letters in the *Apographum*. The beginning of the sentence may have been something like this, suggested by Hu., footnote: *Reddito uero interdicto, si ab alterutro alteri uis facta sit, statim de ea sponsiones et restipulationes fiunt. ne tamen in ciuili et propria ui possessionem obtinere conentur, praetor fructus licitationem inter eos instituit, et uter eorum uicerit fructus licitando*, etc.

<sup>2</sup> Gou. proposes—*neuter eorum qui licentur ipsam rem, sed tantisper possidendi et fruendi re adquirit facultatem*; K. (*K. u. S.* footnote)—*de eo inter se certant uter eorum fructus interim percipiat*; Hu.—*dum uolunt uterque frui tantisper re, proprie quod eis praetor uendit, est, ut id interea liceat*. None of these reconstructions much resembles what is visible in the ms.; which, however, is greatly injured at this place by Bluhme's chemicals.

<sup>3</sup> P. substitutes *ni*.

*uis moribus facta* (Lil., pro Caec. i. 2. VIII. 2. 2.)

- possidenti sibi uis facta est, et inuicem ambo restipulantur aduersus sponsionem: uel — — — — —.<sup>4</sup>
- 166a — — — — — iudex apud quem de ea re agitur illud scilicet requirit [*quod*] praetor interdicto complexus est, id est uter eorum eum fundum easue aedes per id tempus quo interdictum redditur nec ui nec clam nec precario possideret. cum iudex id explorauerit, et forte secundum me iudicatum sit, aduersarium mihi et sponsionis et restipulationis summas quas cum eo feci condemnat, et conuenienter me sponsionis et restipulationis quae mecum factae sunt absoluit; et hoc amplius, si apud aduersarium meum possessio est, quia is fructus licitatione uicit, nisi restituat mihi possessionem,
- 167 Cascelliano siue secutorio iudicio condemnatur.<sup>1</sup> Ergo is qui fructus licitatione uicit, si non probat ad se pertinere possessionem, sponsionis et restipulationis et fructus licitationis summam poenae nomine soluere et praeterea posses-

- that, contrary to the praetor's interdict, violence has been done to him while possessing, and both reciprocally restipulate in
- 166a answer to the sponsion; — — — — —. [*For—[mulae having thereafter been adjusted upon all those sponsions [and restipulations], the judge to whom the matter is remitted proceeds to consider the question dealt with by the praetor in his interdict, namely, which of the parties possessed the land or house in question, and that neither violently, clandestinely, nor on sufferance, at the time when the interdict was pronounced. Having done so, and given judgment (let us suppose) in my favour, he finds my opponent liable to me in the amounts of the sponsion and restipulation I entered into with him, and conformably acquits me in respect of the sponsion and restipulation in which I was promiser; whilst my opponent, if the possession be with him, because he had over-bid me in the fructus licitatio, is over and above condemned in the Cascel-*
- 167 *lian or after-process, if he do not restore it. He therefore who has been successful in the fructus licitatio, if he fail to establish that he is entitled to possession, has to pay as a penalty the sums severally covered by his sponsion, restipu-*

<sup>4</sup> Schmidt (*Interd.* p. 288) suggests—uel si unus tantum sponsione prouocauit alterum, una inter eos sponsio et una tantum restipulatio aduersus eam fit; Hu.—uel stipulationibus iunctis duabus una inter eos sponsio itemque restipulatio una alterius aduersus eam fit. quod et

commodius ideoque magis in usu est. § 166a. Hu. suggests as the commencement of the par.: *Deinde ab utroque editis formulis omnium stipulationum et restipulationum quas fieri placuit, iudex, etc.*

<sup>1</sup> Comp. § 169; fr. 3, § 11, D. uti poss. (xliii, 17).

- sionem restituere iubetur, et hoc amplius fructus quos interea percepit reddit; summa enim fructus licitationis non pretium est fructuum, sed poenae nomine soluitur, quod quis alienam possessionem per hoc tempus retinere et facultatem fruendi  
 168 nancisci conatus est. Ille autem qui fructus licitatione uictus est, si non probauerit ad se pertinere possessionem, tantum sponsionis et restipulationis summam poenae nomine  
 169 debet. Admonendi tamen sumus liberum esse ei qui fructus licitatione uictus erit, ommissa fructuaria stipulatione, sicut Cascelliano siue secutorio iudicio de *possessione recipienda experitur, ita (similiter)*<sup>1</sup> de fructus licitatione *agere*: in quam *rem* proprium iudicium comparatum est quod appellatur fructuarium, quo nomine actor iudicatum solui<sup>2</sup> satis accipit: dicitur autem et hoc iudicium secutorium, quod sequitur sponsionis uictoriam; sed non aequae Cascellianum uocatur.  
 170 Sed quia nonnulli interdicto reddito cetera ex interdicto

- lation, and *licitatio*, and is required besides to restore possession and return the fruits he has drawn in the meanwhile; for the amount of the *fructus licitatio* is not the purchase-price of the fruits, but paid by way of penalty, in consideration that the party has attempted for the time to retain a possession that belonged to another, and the power of taking  
 168 the fruits and profits. He, on the other hand, who has been unsuccessful in the *fructus licitatio*, if he fail to prove that the possession is his, owes no more than the amount of his sponson and restipulation, and that by way of penalty.  
 169 It must not, however, be overlooked that it is in the power of the unsuccessful party in the *fructus licitatio* to disregard the fructuary stipulation, and take separate proceedings upon the *licitatio*, just as he does in the Cascellian or after-process for recovery of the possession; and for this purpose a separate procedure, called a *iudicium fructuarium*, has been devised, in respect whereof the pursuer is entitled to have security from the defender for payment of whatever the judge may find to be due. This *iudicium fructuarium* is also spoken of as an after-process, because it is a sequel to success in the sponson; it does not, however, get the name of Cascellian.  
 170 But as some persons, after interdict had been pronounced,

§ 169. Comp. § 166.

<sup>1</sup> Gou., K. u. S., and Hu. are all agreed upon this word, although no more than the initial *s* is legible.<sup>2</sup> Comp. § 91.

§ 170. It is from Studemund's revision of the Verona ms. that we first become acquainted with the secondary



facere nolebant, atque ob id non poterat res expediri, praetor *in eam rem prospexit et comparauit interdicta quae secundaria appellamus, quod secundo loco redduntur: quorum (uis et (potestas haec est, ut qui)*<sup>1</sup> *cetera ex interdicto non faciat, ueluti qui uim non faciat aut fructus non liceatur, aut qui fructus licitationis satis non det, aut si*<sup>2</sup> *sponsiones*<sup>3</sup> *non faciat sponsionumue*<sup>4</sup> *iudicia non accipiat, siue possideat, restituat*<sup>5</sup> *aduersario possessionem, (siue non possideat, uim)*<sup>6</sup> *illi possidenti ne faciat. Itaque etsi alias potuerit interdicto UTI POSSIDETIS vincere si cetera ex interdicto — — — —*<sup>7</sup> *tamen*  
 170a *per interdictum secundarium — — — —*.<sup>8</sup> [170a] — — — — —.

occasionally refused to take the necessary steps under it, and so put a stop to further procedure, the praetor turned his attention to the matter and introduced interdicts of another sort, which we call secondary, because they are had recourse to only in the second instance. Their purpose and effect is this,—that he who fails to do what is incumbent upon him [with a view to further procedure] under the interdict,—who, for example, will not offer [conventional] violence [to his adversary], or will not bid for the fruits, or will not give security for the *fructus licitatio*, or will not be a party to the sponsions, or will not defend the *iudicia* founded upon them, —must, if he possess, restore the possession to the other party, or, *if he do not possess*, must abstain from offering violence to the possessor. And thus, although he might very possibly have been successful in the interdict *uti possidetis*, *had he been ready to do what was necessary on his part* [to further the procedure], the possession is nevertheless, by this  
 170a secondary interdict, transferred to his adversary. [170a] — — — — —.

interdict described in this par., and get an enumeration of the various steps of procedure in the *int. uti possidetis*. Although a considerable portion of the par. is printed in ital. as not absolutely certain, yet as a whole it may be taken as accurate. Comp. Front. *de contr. agr.* p. 44.

<sup>1</sup> So K. (*Krit. Vers.* p. 84), K. u. S., Hu., and P.

<sup>2</sup> Hu. proposes to delete *si*.

<sup>3</sup> The ms. has *sponsionibus*.

<sup>4</sup> Hu. reads [*ex*] *sponsionibusue*.

<sup>5</sup> Before *restituatur* Hu. interpolates *cum fructibus*.

<sup>6</sup> So K. u. S., Hu., and P.

<sup>7</sup> K. (*Krit. Vers.* p. 102) proposes *paratus sit facere*; Hu. *fecisset, si non fecit*; P. *facere uoluisset*.

<sup>8</sup> K. (*Krit. Vers.* p. 102) proposes *possessio in aduersarium transfertur*; Hu. *uincitur*. K. u. S. (foot-note) suggest the transposition of *tamen*, making the sentence run thus: *Itaque etsi alias potuerit interdicto uti possidetis vincere, tamen si cetera ex interdicto facere uoluerit, per interdictum secundarium possessio in aduersarium transfertur*.

§ 170a. Lines 11–24 of p. 246 of the

- 171 — — — — — (modo) pecuniaria poena, modo iurisiurandi *religione* — — — : eaque praetor — — — — —<sup>1</sup> *aduersus* (*infittiantem ex quibusdam*) *causis* dupli actio constituitur, *ueluti si iudicati*<sup>2</sup> *aut depensi*<sup>3</sup> *aut damni iniuriae*<sup>4</sup> *aut legatorum per damnationem relictorum*<sup>5</sup> nomine agitur : ex quibusdam causis sponsionem facere permittitur, uelut de pecunia certa credita<sup>6</sup> et pecunia constituta;<sup>7</sup> sed certae quidem creditae pecuniae tertiae partis, constitutae uero pecuniae partis dimidia. Quodsi neque sponsionis neque dupli actionis periculum ei cum quo agitur iniungatur,<sup>1</sup> ac ne statim quidem ab initio pluris quam simpli sit actio, permittit

- 171 [We have to observe in the next place that, in the old law, [endeavour was made to restrain rash and precipitate litigation], sometimes by pecuniary penalties, sometimes by the religious compulsitor of an oath; and these [devices are still made use of by] the praetor. [As regards in the first place a defender] denying his liability, action is granted against him in certain cases for double the amount of his debt, as in the case of the *actio iudicati*, the *actio depensi*, the action upon the Aquilian law, and the action for a legacy bequeathed by damnation. In certain other cases a [penal] sponsion is allowed, as in the actions *de pecunia certa credita* and *de pecunia constituta*; in the former the sponsion is for a third  
172 part more, in the latter for a half. Where the risk neither of a sponsion nor of an action for double the amount of his debt is laid upon the defender, and the action is not one that from the first is for more than the simple sum claimed, the

ms. are almost entirely illegible. But we have *secundarium* on l. 13, *quamuis hanc opinionem* on l. 14, and *Sabinus et Cassius secuti fuerint* on l. 15. We may conclude therefore that Gai. went here into some further explanation of the *interdictum secundarium*.

§§ 171-183. Comp. tit. I. *DE POENA TEMERE LITIGATIVUM* (iv, 16). All but the last three lines of p. 247, and two or three letters on ll. 8, 9, are illegible; even the last three lines are only partially legible.

§ 171. Comp. §§ 9, 13; pr. tit. I. *afd.*

<sup>1</sup> Hu., borrowing from the Inst., thus completes the par.: *Nunc admonendi sumus, ne facile homines ad litigandum procederent, iam an-*

*tiquo iure placuisse temeritatem litigandi uariis incommodis, modo pecuniaria poena, modo iurisiurandi religione, coercendam esse: eaque praetor quoque tuetur. ideo ex parte eius cum quo agitur aduersus, etc.*

<sup>2</sup> Comp. § 9.

<sup>3</sup> Comp. iii, 127.

<sup>4</sup> Comp. iii, §§ 210 f.; iv, 9.

<sup>5</sup> Comp. iii, §§ 201-204.

<sup>6</sup> Comp. Cic. *pro Rosc. com.* iv, 10, v, 14; Gai. iii, 124; iv, 13.

<sup>7</sup> Comp. Paul. ii, 2, § 9; § 9, I. *de act.* (iv, 6); tit. D. *de const. pec.* (xiii, 5).

§ 172. Comp. § 1, tit. I. *afd.*; fr. 44, § 4, D. *fam. ercisc.* (x, 2).

<sup>1</sup> So L. and all eds.; the ms. has *coniungatur*.

- praetor iusiurandum exigere 'non calumniae causa infitias ire:'<sup>2</sup> unde *quamuis*<sup>3</sup> heredes uel qui heredum loco habentur *simplotenus*<sup>4</sup> obligati sint, item feminis pupillisque *eximatur*
- 173 *periculum* sponsionis, iubet tamen eos iurare. Statim autem ab initio pluris quam simpli actio est ueluti furti manifesti quadrupli, nec manifesti dupli, concepti et oblati tripli: nam ex his causis et aliis quibusdam, siue quis neget siue fateatur, pluris quam simpli est actio.
- 174 Actoris quoque calumnia<sup>1</sup> coercetur modo calumniae iudicio
- 175 modo contrario, modo iureiurando, modo restipulatione. Et quidem calumniae iudicium aduersus omnes actiones locum habet, et est decimae partis *rei*,<sup>1</sup> *sed*<sup>2</sup> aduersus adsertorem

- praetor allows an oath to be exacted from him 'that he is not vexatiously denying his liability.' Accordingly, although heirs and those in the position of heirs are not held liable for *more than single payment*, and women and pupils are exempt from the risk of a sponsion, still the praetor requires all of
- 173 them to give their oath [of calumny]. Of actions that from the first are for more than single payment, we have the action of manifest theft for fourfold, that of non-manifest theft for twofold, and those for receipt of stolen property and introduction of it into another person's premises, which are for threefold; in these and in some other cases the action is for more than single payment, no matter whether the defender deny his liability or admit it.
- 174 Vexatious conduct on the part of a pursuer is likewise repressed, sometimes by a *iudicium calumniae*, sometimes by a *iudicium contrarium*, sometimes by his oath, sometimes by
- 175 restipulation. There is room for a *calumniae iudicium* [i.e. an instruction to the judge, in the event of the defender's acquittal, to inquire whether the proceedings of the pursuer were groundless and vexatious] in all actions; it justifies condemnation in a sum equal to one-tenth of the value of the cause of action, but as against an *adsertor libertatis* one-third.

<sup>2</sup> Comp. Paul. i, 5, § 1.

<sup>3</sup> The ms. has *qu*; Hu. *quia*.

<sup>4</sup> So Stud.; Bk. suggests *iure ciuili non amplius*; K. u. S. (foot-note), *nisi ex suo facto*; Hu. *aliis quoque poenis obligati [non] sunt*.

§ 173. § 1, tit. I. af. Comp. Gai. iii, §§ 189-191.

§ 174. Comp. § 1, tit. I. af. Gai. deals

with the *calumniae iudicium* in §§ 175-179; the *contrarium iudicium* in §§ 177-179; the restipulation in § 180.

<sup>1</sup> See Paul. i, 5, § 1.

§ 175. <sup>1</sup> Comp. § 163.

<sup>2</sup> K. u. S. read *praeterquam quod*, adding *est* after *partis*; Hu. has *tantum*, with same addition.

- 176 *tertia* partis.<sup>3</sup> Liberum est autem ei cum quo agitur aut calumniae iudicium opponere aut iusiurandum exigere non
- 177 calumniae causa agere. Contrarium autem iudicium ex certis causis constituitur, ueluti si iniuriarum agatur,<sup>1</sup> et si cum muliere eo nomine agatur quod dicatur uentris nomine in possessionem missa dolo malo ad alium possessionem transtulisse,<sup>2</sup> et si quis eo nomine agat quod dicat se a praetore in possessionem missum ab *aliquo* <sup>3</sup> admissum non esse:<sup>4</sup> sed aduersus iniuriarum quidem actionem decimae partis
- 178 datur, aduersus uero duas istas quintae. Seuerior autem coercitio est per contrarium iudicium: nam calumniae iudicio x. partis nemo damnatur nisi qui intellegit non recte se agere, sed uexandi aduersarii gratia actionem instituit, potiusque ex iudicis errore uel iniquitate uictoriam sperat quam ex causa ueritatis: calumnia enim in adfectu est, sicut furti crimen: contrario uero iudicio omni modo damnatur actor si causam

- 176 It is for the defender to elect whether he will have this *calumniae iudicium* superinduced upon the action, or insist upon the pursuer's oath that he is not litigating vexatiously.
- 177 The *contrarium iudicium* [or cross-action] is competent only in certain cases, as when the action is an *actio iniuriarum*, or an action against a woman on the allegation that, having been put into possession of an estate to preserve it for an infant *in utero*, she fraudulently transferred it to another, or an action by any one on the allegation that, having obtained from the praetor a grant of possession, the defender opposed his entry: when it is in response to an *actio iniuriarum* it is for a tenth part [of the claim made therein], but when in answer to either
- 178 of the other two, it is for a fifth part. The *contrarium iudicium* is more coercive than the *calumniae iudicium*; for in this last a man is never condemned in the tenth unless he really knew that his proceedings were unjustifiable, and was in fact litigating for the purpose of annoying his opponent, basing any hopes of success rather on the possible mistakes or unfairness of the judge than on the goodness of his cause; for *calumnia*, vexatious litigation, like theft, depends on intention. In the *contrarium iudicium*, on the other hand, the

<sup>3</sup> Comp. Paul. v, 33, § 7; tit. C. Th. de lib. causa (iv, 18); tit. C. de adsert. toll. (vii, 17).

§ 176. Comp. Paul. ii, 1, § 2.

§ 177. <sup>1</sup> Comp. Paul. v, 4, § 11; fr. 43, D. de iniur. (xlvii, 10).

<sup>2</sup> Cp. tit. D. si uentr. nom. (xxv, 5).

<sup>3</sup> The ms., K. u. S., Hu., and P. have *alio quo*.

<sup>4</sup> Comp. tit. D. ne uis fiat ei q. in poss. (xliii, 4).

§ 178. Comp. iii, 197.



- non tenuerit, licet *falsa*<sup>1</sup> opinione inductus crediderit se recte  
 179 agere. Vtique autem ex quibus causis contrario iudicio agi  
 potest, etiam calumniae iudicium locum habet; sed alterutro  
*tantum* iudicio agere permittitur: qua ratione si iusiuran-  
 dum de calumnia exactum fuerit, quemadmodum calumniae  
 iudicium non datur, ita et contrarium dari non<sup>1</sup> debet.  
 180 Restipulationis quoque poena ex certis causis fieri solet; et  
 quemadmodum contrario iudicio omni modo condemnatur  
 actor si causam non tenuerit, nec requiritur an scierit non  
 recte se agere, ita etiam restipulationis poena omni modo  
 181 damnatur actor.<sup>1</sup> — — — — restipulationis poena petitur,  
 ei neque calumniae iudicium opponitur neque iurisiurandi  
 religio iniungitur; nam contrarium iudicium in his causis  
 locum non habere palam est.  
 182 Quibusdam iudiciis damnati ignominiosi fiunt, ueluti furti,

- pursuer, if he have failed in his suit, is invariably condemned,  
 even though, labouring under some misapprehension, he may  
 179 have believed that his proceedings were well-founded. Of  
 course, in those cases in which the *contrarium iudicium* is  
 competent, there is room also for the *iudicium calumniae*; but  
 we can employ only one or other of these remedies. Upon  
 the same principle, just as a *iudicium calumniae* is disallowed  
 where the defender has required an oath of calumny from the  
 pursuer, so must the *contrarium iudicium* be excluded in the  
 180 same circumstances. A restipulatory penalty is also im-  
 posed in certain cases; and just as in the *contrarium iudicium*  
 the pursuer who has failed in proving his averments is invari-  
 ably condemned, without any inquiry whether or not he knew  
 that he was suing improperly, so is he [when unsuccessful]  
 invariably mulcted in the amount of his penal restipulation.  
 181 When a man sues under a restipulatory penalty, neither can  
 a *iudicium calumniae* be imposed upon him, nor can he be  
 fettered by the sanctity of an oath: that in such a case there  
 can be no *iudicium contrarium* is quite clear.  
 182 In some actions a defender who is condemned therein is

<sup>1</sup> So M. (K. u. S. footnote) and P.; the ms. has *alia*; G., K. u. S., and Hu. *aliqua*.

§ 179. Comp. § 176.

<sup>1</sup> The ms. has *non dari*.

§ 180. Comp. §§ 13, 171.

<sup>1</sup> Hu. assumes this to be the end of the par.; K. (K. u. S. footnote) supposes some of the words in the

illegible half line at the commence-  
 ment of p. 250 of the ms. to have  
 belonged to it,—possibly *si sponsione  
 uictus est*.

§ 181. For the illegible initial words K. (K. u. S. footnote) suggests *a quo autem*; Hu. supplies *sed cum ab actore cum*.

§ 182. Comp. § 2, tit. I. aff. The

ui bonorum raptorum, iniuriarum: item pro socio, fiducia, tutelae, mandati, depositi: sed furti aut ui [bonorum] raptorum aut iniuriarum *non solum* damnati notantur ignominia sed etiam pacti, *ut in* edicto praetoris scriptum est; et recte: plurimum enim interest utrum ex delicto aliquis an ex contractu debitor sit.<sup>1</sup> *Item* illa parte edicti id ipsum nominatim *exprimitur* — — — — — nomine iudicio interuenire; *interest enim* — — — — —.<sup>2</sup>

183 In summa sciendum est eum qui — — — — —<sup>1</sup> et eum qui uocatus est — — — — —.<sup>2</sup> *quasdam (tamen personas)*

branded with infamy; this happens, for example, in the actions for theft, robbery, or personal injury; as also in those arising out of partnership, fiduciary agreement, tutory, mandate, and deposit. In the three first, according to the praetor's edict, it is not only a defender who has actually been condemned that becomes infamous, but also one who has compromised; and very properly; for it makes a great difference whether a man's indebtedness arises from delict or from contract. In the same chapter of the edict it is expressly declared [*that a person who is infamous is in most cases disqualified for addressing a court of law on another person's behalf, for appointing a cognitor or procurator, and for himself acting in either capacity*] in judicial matters; for it is of importance [*that litigation should be conducted honourably*].

183 Finally be it observed that he [*who is moving in a litigation must formally summon his adversary; if the latter do not obey*

words of the edict referred to in the legible part of the par. are in fr. 1, D. *de his qui not. infam.* (iii, 2); from which it will be observed that infamy resulted only when the party was defending *proprio nomine*.

<sup>1</sup> Infamy was avoided by compromise when the debt was *ex contractu*, but not when *ex delicto*.

<sup>2</sup> K. u. S. suggest the following reconstruction (legible words and letters being in roman type)—*exprimitur pactum quoque ignominiosum fieri qua prohibetur pro aliis postulare, uel procurator dari [uel] procuratorem adhibere cognitoremue, uel cognitorum nomine iudicio interuenire*. The statement here is incorrect; the reference to the infamous result of compromise of a claim *ex delicto* is in the edict *de infamia* (fr. 1, D. *de his q. not. inf.* iii, 2); that forbidding infamous persons to

act as procurators, etc., is in the edict *de postulando* (fr. 1, § 8, D. *de post.* iii, 1). Hu. proposes—*exprimitur ut qui ignominiosus sit plerumque prohibeatur pro aliis postulare, item cognitorem dare, procuratorem adhibere, uel cognitorio aut procuratorio nomine iudicio interuenire; interest enim cum honestis litigare*. This is a very reasonable reconstruction. Comp. Paul. i, 2, § 1; Fr. Vat. § 324; fr. 1, § 8, D. *de post.* (iii, 1).

§ 183. Comp. §§ 46, 187; fr. 1-4, fr. 23-25, D. *de in ius uoc.* (ii, 4).

<sup>1</sup> Hu. proposes *experitur, in ius uocare oportere*. K. u. S. agree as to the idea, but are unable to suggest probable words for the illegible half line.

<sup>2</sup> Here Hu. proposes *si non sequitur, sine auctoritate praetoris posse secum ducere*.

- sine permissu praetoris in ius uocare non licet, *ueluti parentes patronos patronasque, liberos et parentes patroni patronaeue* ;  
 184 et in eum qui aduersus ea egerit poena constituitur. Cum autem in ius uocatus fuerit aduersarius, neque eo die *finiri potuerit* negotium, uadimonium ei faciendum est, *id est ut*  
 185 promittat se certo die sisti. Fiunt autem uadimonia quibusdam ex causis pura, id est sine satisdatione, quibusdam cum satisdatione, quibusdam iureiurando, quibusdam recuperatoribus suppositis, id est ut qui non steterit is protinus a recuperatoribus in summam uadimonii condemnetur : eaque  
 186 singula diligenter praetoris edicto significantur. Et siquidem iudicati depensiue agetur, tanti fit uadimonium quanti ea res erit ; si uero ex ceteris causis, quanti actor iurauerit non calumniae causa postulare sibi uadimonium promitti : nec tamen [*pluris quam partis dimidia*], nec pluribus quam sestertium C milibus fit uadimonium : itaque si centum milium res erit, nec iudicati depensiue agetur, non plus quam

- [*the summons, the pursuer may bring him into court*]. There are certain persons, however, whom it is unlawful to summon without the praetor's permission, such as parents, patrons, and the children or parents of patrons ; any one contravening in  
 184 this respect is liable to a penalty. When the defender has been summoned into court, but the case cannot be concluded the same day, he must give his *uadimonium*, *i.e.* his stipula-  
 185 tory undertaking to appear again on a day fixed. In some cases *uadimonia* are pure, *i.e.* without sureties, in some sureties are necessary, in some they are coupled with an oath, while in others there is a reference to recuperators, *i.e.* the defender consents that if he fail to appear he may at once be condemned by them in the amount of his *uadimonium* ; all  
 186 these are carefully distinguished in the edict. In the case of an *actio iudicati* or an *actio depensi* the *uadimonium* is of the same amount as is sued for. In other cases it is fixed at such an amount as may be named by the pursuer, under an oath that he is not naming it vexatiously, so long as it does not [*relatively exceed one-half of the sum at stake*] nor [*absolutely*] a hundred thousand sesterces ; so that if the matter of dispute be worth a hundred thousand sesterces, and the action neither

§ 184. Comp. iii, 224 ; Varro, *de L. L.* vi, 74 (Bruns, p. 278).

§ 185. Comp. tit. D. *qui satisdare cog.*, *uel iurato promittunt, uel suae promissioni committantur* (ii, 8).

§ 186. The words in ital. are added by Hu., and adopted by K. u. S. and P., and from the context absolutely necessary.

187 sestertium quinquaginta milium fit uadimonium. Quas autem personas sine permissu praetoris inpune in ius uocare non possumus, easdem nec uadimonio inuitas obligare possumus, praeterquam si praetor aditus permittat.

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an *actio iudicati* nor an *actio depensi*, the *uadimonium* cannot  
187 exceed fifty thousand. But we cannot require those persons whom we cannot summon with impunity without the praetor's permission to become bound to us in a *uadimonium* against their will, unless the praetor allow it on special application.

§ 187. Comp. § 183 ; fr. 1-3, D. *in ius uocati* (ii, 6).





DOMITII VLPIANI

QVAE VOCANT

F R A G M E N T A

‡SIVE EXCERPTA EX

VLPIANI LIBRO SINGVLARI REGVLARVM.



EXCERPTA EX  
DOMITII VLPiani  
LIBRO SINGVLARI REGVLARVM.



1 — — — — — prohibet, exceptis quibusdam

1 [A statute is either perfect, or imperfect, or short of perfect. [It is perfect when it forbids something to be done, and if done rescinds it; the Aelia-Sentian law is a statute of this sort. [That is imperfect which forbids a thing, yet if it be done [neither rescinds it nor imposes a penalty on the contravener; [such is the Cincian law, which] prohibits [donations beyond a [specified amount], except to certain kinsmen, yet does not

RUBRIC. In place of this rubric the MS. has the words *INCIPIVNT TITVLI EX CORPORE VLPiani*, followed by a list of the titles into which the treatise is divided. As those titles, however, are generally admitted not to be Ulpian's, nor even the work of the epitomist to whom we owe these 'Excerpts' (see Introduction), I have thought it inexpedient to reproduce the list.

Owing probably to a displacement of pages in the copy of the archetype used by the transcriber, the text of the MS. begins with what is here numbered as § 4, *Mores sunt tacitus consensus populi longa consuetudine inueteratus*; then comes the list of titles just referred to; next §§ 5-9; next §§ 1-3; and after them §§ 10 f. This order was preserved in the earliest editions, the sentence *Mores sunt*, etc., being printed as a sort of motto. The mistake is obvious. It is evident that Ulpian, before proceeding to deal with persons, devoted a few pars. to law in general and its sources; but the commencement of what he said on the subject is lost, and probably was

not contained in the copy from which the Vatican MS. was transcribed. We know, however, from fr. 10 D. *de I. et I.* (i, 1) that what stands as the pr. and §§ 1 and 3 of the first title of the first book of the Inst. were from this treatise of Ulpian's.

§ 1. All eds. are agreed that the par. must have commenced with such words as these: *Lex aut perfecta est aut imperfecta aut minus quam perfecta. Perfecta lex est quae uetat aliquid fieri, et si factum sit rescindit, qualis est lex — — — Imperfecta lex est quae uetat aliquid fieri, et si factum sit nec rescindit nec poenam iniungit ei qui contra legem fecit, qualis est lex Cincia, quae supra certum modum donari prohibet*, etc.

As Ulpian's probable illustration of a *lex perfecta*, Cuj. suggests the *L. Aelia Sentia*.

Macrob. (in *Somn. Scip.* ii, 17) defines a *lex imperfecta* as one in qua nulla deuantibus poena sancitur. On the *L. Cincia* (of 550 | 204) see Cic. *ad Att.* i, 20, § 7; Tac. *Ann.* xi, 5; Fr. Vat. §§ 298-313. Another illustration of an imperfect law is the *L. Valeria* (Liv. x, 9).



- 2 cognatis,<sup>1</sup> et si plus donatum sit non rescindit. Minus quam perfecta lex est quae uetat aliquid fieri, et si factum sit non rescindit, sed poenam iniungit ei qui contra legem fecit; qualis est lex Furia testamentaria, quae plus quam mille assium legatum mortisue causa<sup>1</sup> prohibet capere, praeter exceptas personas,<sup>2</sup> et aduersus eum qui plus ceperit quadrupli poenam constituit.
- 3 Lex aut rogatur, id est fertur; aut abrogatur, id est prior lex tollitur; aut derogatur, id est pars *primae* [*legis*]<sup>1</sup> tollitur; aut subrogatur, id est adicitur aliquid primae legi; aut obrogatur, id est mutatur aliquid ex prima lege.
- 4 Mores sunt tacitus consensus populi longa consuetudine inueteratus.

## [I. DE LIBERTIS.]

- 5 Libertorum genera sunt tria, ciues Romani, latini Iuniani, dediticiorum numero.

- 2 nullify what is given in excess. Short of perfect is that which forbids a thing, and if it be done does not rescind it, but imposes a penalty upon the contravener; of this class is the Furian testamentary law, which forbids all but certain excepted persons to take more than a thousand *asses* as a legacy or otherwise by reason of death, and imposes a fourfold penalty upon him who has taken a larger sum.
- 3 We say of a law '*rogatur*' when it is passed; '*abrogatur*,' when it is repealed; '*derogatur*,' when part of it is repealed; '*subrogatur*,' when something is added to it; '*obrogatur*,' when some of its provisions are altered.
- 4 By '*mores*' we mean the tacit consent of a people, become inveterate by long observance.

## [I. OF FREEDMEN.]

- 5 There are three classes of freedmen,—Roman citizens, Junian latins, and those numbered among the dediticians.

<sup>1</sup> Hu. proposes as an amendment *exceptis* [*personis*] *quibusdam* [*uelut*] *cognatis*, on the ground that the exception was not confined to cognates.

§ 2. On the *L. Furia*, see xxviii, 7; Gai. ii, 225; iv, 23.

<sup>1</sup> See Gai. ii, 225, note 2.

<sup>2</sup> See Gai. ii, 225, note 1.

§ 3. Comp. Fest. and Paul. Diac. vv. *Rogatio*, *Abrogare*, *Derogare*, *Obrogare*, *Exrogare* (Bruns, pp. 261, 240, 250, 241); Modest. in fr. 102, D. de V. S. (1, 16).

<sup>1</sup> So Cuj. and most eds.; the ms. has *pars prima*.

§ 4. Comp. § 9, I. *de iure naturali* (i, 2).

§ 5. Comp. Gai. i, 12.

- 6 Ciues Romani sunt liberti, qui legitime [*manumissi sunt, [id est aut uindicta aut]*<sup>1</sup> censu aut testamento, nullo iure  
 7 inpediente.<sup>2</sup> Vindicta manumittuntur apud magistratum  
*populi Romani*,<sup>1</sup> uelut consulem proconsulem praetoremue.<sup>2</sup>  
 8 Censu manumittebantur olim qui lustrali censu Romae iussu  
 9 dominorum inter ciues Romanos censum profitebantur. Vt  
 testamento manumissi liberi sint lex duodecim tabularum  
 facit, quae confirmat — — —.<sup>1</sup>  
 10 — — — — —<sup>1</sup> hodie autem ipso iure liberi sunt ex  
 lege Iunia, qua lege latini sunt nominati<sup>2</sup> inter amicos<sup>3</sup>  
 manumissi.

- 6 Those freedmen are Roman citizens that have been manu-  
 mitted formally, *i.e.* by *uindicta*, census, or testament, in the  
 7 absence of any legal impediment. Manumission *uindicta*  
 takes place before a magistrate of the Roman people, such  
 8 as a consul, proconsul, or praetor. Those used formerly to  
 be manumitted *censu* who, at the lustral census in Rome, by  
 order of their owners, gave in their names for enrolment as  
 9 Roman citizens. That those manumitted by testament are  
 free results from the provisions of the Twelve Tables declar-  
 ing the validity of *testaments*.  
 10 [*Latins are freedmen de facto in possession of freedom simply*  
*[by the pleasure of their owners. Formerly their enjoyment of it*  
*[depended on their protection in it by the praetor]*; but now  
 they are *ipso iure* free by the Junian law, wherein slaves  
 manumitted *inter amicos* are spoken of as latins.

§ 6. Comp. Gai. i, §§ 17, 44.

<sup>1</sup> This addition substantially the same with all eds.

<sup>2</sup> Such as the restrictions of the Aelia-Sentian law, referred to below, §§ 11-15, or Fufia-Caninian law, § 24.

§ 7. See refs. in Gai. i, 17, note 2; also tit. D. de man. uind. (xl, 2); l. 4, C. de uind. (vii, 1).

<sup>1</sup> Here, as in xx, 16, the ms. has *praetoriani* for *populi Romani*.

<sup>2</sup> So Momms. (*Stadr. v. Salpensa*, note 131); the ms. has *apud magistratum praetoremue, uelut consulem, proconsulem*.

§ 8. See refs. in Gai. i, 17, note 3.

§ 9. See refs. in Gai. i, 17, note 4; also below, §§ 20-25.

<sup>1</sup> M. thinks *testamenta* sufficient; Cuj. suggested *testamento datas libertates*; to which Hu., following L., adds *his uerbis* 'uti legassit suae rei, ita ius esto.'

§ 10. Comp. Gai. i, 22, and note; iii, 56.

<sup>1</sup> Cuj. (*Observ. xix, 30*) proposed to fill the blank thus: *Inter amicos manumissi olim non erant ipso iure liberi, sed uoluntate domini in libertate morabantur, et eos seruire non permittebatur praetor*. Hu. has: *Latini sunt liberti qui non legitime, uelut inter amicos, nullo iure inpediente, manumissi sunt, quos olim praetor tantum tuebatur in forma libertatis; nam ipso iure serui manebant*. M. proposes more simply: *Latini sunt liberti qui uoluntate domini in libertate morantur. quos olim praetor tuebatur in possessione libertatis, etc.*

<sup>2</sup> So the ms. and the earliest eds. L. and Bk. have *latini sunt nominati*; Hu. *latini Iuniani nominati sunt*; K. *latini fiunt nominati*.

<sup>3</sup> See Gai. i, 41, note.

- 11 Dediticiorum numero sunt qui poenae causa uincti sunt a domino, *quibusue stigmata*<sup>1</sup> scripta fuerunt, qui[ue] propter noxam torti nocentesque inuenti sunt, quique traditi sunt ut ferro aut cum bestiis depugnarent, [*inue ludum*]<sup>2</sup> uel custodiam coniecti fuerunt, deinde quoquo modo manumissi sunt: idque lex *Aelia Sentia*<sup>3</sup> facit.
- 12 Eadem lege cautum est ut minor triginta annorum seruus uindicta manumissus ciuis Romanus non fiat nisi apud consilium causa probata fuerit; *ideo*<sup>1</sup> sine consilio manumissum *Cassius*<sup>2</sup> seruus manere putat. testamento uero manumissum perinde haberi iubet atque si domini uoluntate in libertate
- 13 esset; <sup>3</sup> ideoque latinus fit. Eadem lex eum dominum qui minor uiginti annorum est prohibet seruus manumittere

11 Those [freedmen] are ranked as dediticians who have been put in chains by their owners as a punishment, or branded, or put to the torture because of some offence and thereof found guilty, or given up to fight either with the sword or with wild beasts, or cast into a gladiatorial training-school or into prison, and have afterwards been manumitted, no matter how. All this is in terms of the *Aelia-Sentian* law.

12 By the same law it is provided that a slave under thirty manumitted *uindicta* shall not become a citizen unless cause has been proved before the council; hence *Cassius* (?) is of opinion that if manumitted without the [approval of] the council he remains a slave. It ordains, however, that if he have been manumitted by testament he shall be regarded as in possession of freedom by the pleasure of his owner; consequently he becomes a latin. The same enactment forbids an owner under twenty to manumit his slave without proving

§ 11. Comp. Gai. i, 13, and refs.

<sup>1</sup> So Uij., after Gai.; the ms. has *quib. uestigia*. Branding seems to have been resorted to when the slave was a deserter (*fugitiuus*); see Quintil. *Inst. Orat.* vii, 4, § 14.

<sup>2</sup> Added from Gai.

<sup>3</sup> The ms. here as elsewhere has *L. Ascia*. See Gai. i, 13, note 1.

§ 12. Comp. Gai. i, §§ 13, 22.

<sup>1</sup> So the ms.; Bk. and Vahl., following L., have *id est*; Hu. *proinde* (*pinde*).

<sup>2</sup> The ms. has *Caesaris*. Hence various suggestions,—*censuue*, *lex Aelia Sentia*, *Cassius*, *Caelius Sabinus*, *eius aetatis*, etc. Bk. and Vahl. prefer *L. Aelia Sentia*, and K.

*Caesaris*. The phrase *lex putat* is certainly very unusual, although Non. Marcell. (v. *Iurgium*, Bruns, p. 286) attributes it to Cicero. *Caesaris seruus manere* is hardly justifiable when the question is of manumission of a slave belonging not to the emperor but to a private party. Therefore I have given the preference to the *Cassius* of Puchta; although Hollweg's *Caelius Sabinus* (*Cael. Sabis.*) is not improbable. The *L. Aelia Sentia* was passed in 757 | 4 (Gai. i, 13, note 1), and *Cassius* (Gai. iii, 71, note) was consul in 783 | 30.

<sup>3</sup> Comp. above, § 10.

§ 13. Comp. Gai. i, §§ 38, 41.

- 13a praeterquam si causam apud consilium probauerit. In consilio autem adhibentur Romae<sup>1</sup> quinque senatores et quinque equites Romani, in prouinciis uiginti recipitatores ciues  
 14 Romani. Ab eo domino qui soluendo non est seruus testamento liber esse iussus et heres institutus, et si minor sit triginta annis uel in ea causa sit ut dediticius fieri debeat, cuius Romanus et heres fit; si tamen alius ex eo testamento nemo heres sit. quod si duo pluresue liberi heredesque esse iussi sint, primo loco scriptus liber et heres fit; quod et ipsum  
 15 lex *Aelia Sentia* facit. Eadem lex in fraudem creditoris et patroni manumittere prohibet.  
 16 Qui tantum in bonis, non etiam ex iure<sup>1</sup> Quiritium seruum habet, manumittendo latinum facit. in bonis tantum alicuius seruus est uelut hoc modo, si ciuis Romanus a ciue Romano<sup>2</sup> seruum emerit, isque traditus ei sit, neque tamen mancipatus ei neque in iure cessus neque ab ipso anno possessus sit: nam

- 13a cause before the council. This council consists in Rome of five senators and as many knights, and in the provinces of  
 14 twenty recuperators, Roman citizens. A slave ordered to be free and instituted heir in the testament of his insolvent owner becomes a Roman citizen and heir under the will, even though he be under thirty or so circumstanced that he ought [otherwise] to be a deditician, provided always that there is no other testamentary heir. If two or more be ordered to be free and heirs, the one first mentioned becomes  
 15 free and heir; this too the *Aelia-Sentian* law enacts. The same statute prohibits manumission in fraud of a creditor or patron.  
 16 He who holds a slave in bonitarian ownership only, and not also in quiritarian right, by manumitting him makes him a latin. And a slave is *in bonis* only when, for example, a Roman citizen buys him from another citizen, and delivery follows, but the slave is neither mancipated, nor ceded in court, nor possessed by the purchaser for a year; for until one or other

§ 13a. Comp. Gai. i, 20.

<sup>1</sup> The ms. has *Romani*.

§ 14. Comp. Gai. i, 21, and note; ii, 154.

§ 15. Comp. Gai. i, §§ 37, 47.

§ 16. Comp. Gai. i, §§ 17, 35. Also below, xix, §§ 4, 7, 20; Gai. ii, §§ 41, 204; iii, 80.

<sup>1</sup> Here, as in many other places,

the ms. has *ex ius* instead of *ex iure*.

<sup>2</sup> If the acquisition was from a peregrin, then, even though the thing was *res Mancipi* by the *ius civile*, yet in his hands it was *res nec Mancipi*, and the full property passed by tradition according to the rules of the *ius gentium*; comp. Fr. Vat. § 47.



- quamdiu horum quid fiat,<sup>3</sup> is seruus in bonis quidem emptoris est, ex iure<sup>1</sup> Quiritium autem uenditoris est. Mulier quae in tutela est, item pupillus et pupilla, manumittere non possunt. Communem seruum unus ex dominis manumittendo partem suam amittit, eaque adcrecit socio; maxime si eo modo manumiserit quo, si proprium haberet, ciuem Romanum facturus esset. nam si inter amicos eum manumiserit, plerisque placet eum nihil egisse. Seruus in quo alterius est ususfructus, alterius proprietas, a proprietatis domino manumissus liber non fit, sed seruus sine domino est.
- 20 Post mortem heredis aut ante institutionem heredis testamento libertas dari non potest, excepto testamento militis.
- 21 Inter medias heredum institutiones libertas data utrisque adeuntibus non ualet: solo autem priore adeunte iure antiquo ualet. sed post legem Papiam Poppaeam,<sup>1</sup> quae

of these takes place, the slave, though *in bonis* of the purchaser, is still in the quiritarian ownership of the seller.

- 17 A woman who is in tutelage cannot manumit [without her tutor's *auctoritas*]; neither can a pupil, whether male or female. One of two joint-owners manumitting a common slave loses his share, which accrues to his partner. This is so, at any rate, if the manumission have been in a form which, had he been sole owner, would have made the slave a citizen: for if it have been only *inter amicos*, the general opinion is that it is of no effect. Manumission by the owner of a slave usufructed by a third party does not make him free; he becomes a slave without an owner.
- 20 Freedom cannot be given by testament, unless it be that of a soldier, [when it is] either [to take effect] after the heir's death or [given] prior to his institution. Nor is such a gift valid if introduced between two institutions, and both the heirs enter; but it was, according to the old rule, if the sole intrant was the heir first instituted. Since the Papia-Poppaean law,

<sup>3</sup> Before *fiat* many eds. insert *non*. But *quamdiu* in the sense of *donec* is by no means unusual with Ulpian; see fr. 15 D. *quib. mod. ususfr. amitt.* (vii, 4), fr. 1, D. *de penu. leg.* (xxxiii, 9).

§ 17. Comp. Gai. i, §§ 40, 192; below, xi, 27. M. thinks the words *nisi tutore auctore (ntā)* should be added after *possunt*.

§ 18. Comp. Paul. iv, 12, §§ 1, 5; § 4, I. *de donat.* (ii, 7).

§ 19. Comp. Fr. Dos. § 13; Vlp. in fr. 9, § 20, D. *de her. inst.* (xxviii, 5); Iustin. in l. 1, pr. C. *commun. de man.* (vii, 15). M. suggests the addition of such words as *donec manet ususfructus, quo finito latinus efficitur*.

§ 20. Comp. xxiv, §§ 15, 16; Gai. ii, §§ 230, 233; §§ 34, 35, I. *de legat.* (ii, 20).

§ 21. Comp. Gai. ii, §§ 206-208, 286.

<sup>1</sup> See Gai. i, 145, note 1.

- partem non adeuntis caducam facit, si quidem primus heres uel [*ius liberorum uel*]<sup>2</sup> ius antiquum<sup>3</sup> habeat, ualere eam posse placuit; quod si non habeat, non ualere constat, quod loco non adeuntis legatarii patres heredes fiunt.<sup>4</sup> sunt tamen
- 22 qui et hoc casu ualere eam<sup>5</sup> posse dicunt.<sup>6</sup> Qui testamento liber esse iussus est, mox *quam uel*<sup>1</sup> unus ex heredibus adierit
- 23 hereditatem liber fit. Iusta libertas testamento potest dari his seruis qui testamenti faciendi et mortis tempore ex iure Quiritium testatoris fuerunt.
- 24 Lex Fufia Caninia iubet testamento ex tribus seruis non plures quam duos manumitti, et usque ad decem dimidiam partem manumittere concedit; a decem usque ad triginta tertiam partem, ut tamen adhuc quinque manumittere liceat

- which makes the share of an heir who does not enter caducous, it is held that the gift of freedom will still be valid if the heir first instituted [be the intrans and] have *either the privilege of children* or the old right of accretion; if he have not, it is held to be invalid, for the legatees who are fathers come in place of the non-entering heir. There are some, however, who maintain that even in this case the gift of freedom will be
- 22 valid. A slave whom a testament orders to be free becomes free the moment that an heir, though only one of several, has
- 23 entered. Freedom such as the *ius civile* recognises can be given by testament [only] to those slaves who belonged to the testator on quiritarian title both at the date of his testament and the time of his death.
- 24 The Fufia-Caninian law ordains that of three slaves no more than two shall be enfranchised by testament, and up to ten allows manumission of half the actual number; from ten to thirty a third, but so that at least five may be manumitted as

<sup>2</sup> So L., Bk., Hu., and K.; Schult. has *liberos uel*; M. proposes *ius patris uel*, which is adopted by Vahl.

<sup>3</sup> The *ius antiquum* was the right of accretion (*ius adcrescendi*) that existed before the Papia-Poppaean caducary legislation, and which was allowed to continue in favour of certain near kinsmen of the testator; see below, tit. xviii, and notes.

<sup>4</sup> Comp. Gai. ii, 207.

<sup>5</sup> So Hu. and K. The ms. has *eius eā*; hence Hugo *iure eam*; L., Bk., and Vahl., *eius causam*; and M. *e testamento eam*.

<sup>6</sup> Comp. xvii, 3.

§ 22. Comp. fr. 23, § 1, fr. 25, D. *de manum. test.* (xl, 4). The assumption is that the enfranchisement stood in the testament posterior to all the institutions.

<sup>1</sup> The ms. has *quamuis*, which Bk. and Vahl. retain; *quam uel* is the suggestion of Marezoll, adopted by Hu. and K.

§ 23. Comp. Gai. ii, 267. If the slave was only *in bonis* of the testator, he became a latin; see xxii, 8.

§ 24. Comp. Gai. i, §§ 42-45. In the ms. the law is called *L. Fusia Caninia*.

aeque ut ex priori numero; a triginta usque ad centum quartam partem, aeque ut decem ex superiori numero liberari possint; a centum usque ad quingentos partem quintam, similiter ut ex antecedenti numero uiginti quinque possint fieri liberi. et denique praecipit ne plures omnino quam  
 25 centum ex cuiusquam testamento liberi fiant. Eadem lex cauet ut libertates seruis testamento nominatim dentur.

## [II. DE STATV LIBERO VEL STATV LIBERIS.]

- 1 Qui sub condicione testamento liber esse iussus est statu
- 2 liber appellatur. Statu liber quamdiu pendet condicio
- 3 seruus heredis [*est*]. Statu liber seu alienetur ab herede siue *usu capiatur*<sup>1</sup> ab aliquo, libertatis condicionem secum
- 4 trahit. Sub hac condicione liber esse iussus: SI DECEM MILIA HEREDI DEDERIT, etsi ab herede abalienatus sit, emptori dando pecuniam ad libertatem perueniet; idque lex duodecim
- 5 tabularum iubet. Si per heredem factum sit quominus

in the previous case; from thirty to a hundred a fourth, but so that at least ten may be freed as under a lower number; from a hundred to five hundred a fifth, it being in any case competent to enfranchise the twenty-five enfranchisable within the lower numbers. And it adds finally that not more than a hundred shall under any circumstances become free under a  
 25 testament. The same enactment requires that testamentary gifts of freedom shall be conferred on slaves by name.

## [II. OF STATV LIBERI.]

- 1 He goes by the name of *statu liber* who in a testament is
  - 2 ordered to be free under some condition. So long as the condition is pendent he remains a slave of the heir's.
  - 3 Whether he be alienated by the heir or usucaptured by a third
  - 4 party, he still carries with him his conditional liberty. A slave ordered to be free on condition of his paying ten thousand sesterces to the heir, if he be alienated by the latter, acquires his liberty on paying the money to his purchaser; so
  - 5 it is ordained by the law of the Twelve Tables. If by any
- § 25. Comp. Gai. i, 45a; ii, 239. <sup>1</sup> So Cuj. and all eds.; the ms. has *auscipiatur*.
- TIT. II, §§ 1, 2. Comp. Fest. v. *Statu liber* (Bruns, p. 268); Gai. ii, 200; § 4. Cp. fr. 6, §§ 3, 7, D. *de statu*. (xl, 7).  
 fr. 1, pr., fr. 3, pr. D. *de statulib*. § 5. Comp. Fest. as in note to §§ 1, 2; fr. 3, §§ 1, 11, D. *de statulib*. (xl, 7); fr. 24, D. *de cond. et dem.* (xxxv, 1); fr. 161, D. *de R. I.* (l, 17).  
 § 3. Cp. fr. 2, pr. D. *de statulib*. (xl, 7).

- statu liber conditioni pareat, proinde fit liber atque si condicio  
 6 expleto fuisset. Extraneo pecuniam dare iussus et liber  
 esse s. paratus sit dare, et is cui iussus est dare aut nolit  
 accipere aut antequam acceperit moriatur, proinde fit liber ac  
 pecuniam dedisset.
- 7 Libertas et directo potest dari hoc modo: LIBER ESTO, LIBER  
 ERIT, LIBERVVM ESSE IVBEO, et per fideicommissum, ut puta:  
 FIDEI COMMITTO HEREDIS MEI, VT *STICHVM*<sup>1</sup> SERVVM  
 8 MANVMITTAT. Is qui directo liber esse iussus est, orcinus  
 fit libertus; is autem cui per fideicommissum data est libertas,  
 9 non testatoris sed manumissoris fit libertus. Cuius fidei  
 committi potest ad rem aliquam praestandam, eiusdem etiam  
 10 libertas fidei committi potest. Per fideicommissum libertas  
 dari potest tam proprio seruo testatoris quam heredis aut  
 11 legatarii uel cuiuslibet extranei seruo. Alieno seruo per  
 fideicommissum data libertate, si dominus eum iusto pretio  
 non uendat, extinguitur libertas, quoniam nec pretii compu-

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act of the heir's a *statu liber* is prevented complying with the condition, he becomes free, just as if it had been fulfilled.

- 6 If a slave ordered to pay money to a stranger as the condition of his freedom be ready to pay it, but the person to whom he is desired to pay it either refuse to accept it or die before doing so, he thereupon becomes free, exactly as if he had paid.
- 7 Freedom may be given [by testament] either directly thus: 'Be free,' 'Let him be free,' or 'I order him to be free;' or by *fideicommissum* thus: 'I request,' 'I entrust to my heir's  
 8 good faith that he manumit the slave Stichus.' A slave who has a direct gift of freedom becomes a *libertus orcinus* [i.e. whose patron is in the nether world]; but he to whom freedom is given fideicommissarily is a freedman not of the  
 9 testator's but of the manumitter's. Any person to whose good faith it can be committed to prestate a thing may also have it committed to his good faith to confer freedom.
- 10 Liberty can be given by *fideicommissum* either to the testator's own slave, to one belonging to the heir or a legatee, or to one  
 11 belonging to any third party. When given to the slave of a third party, if the latter will not sell him for a fair price, the gift of liberty is extinguished, because it is impossible to fix

§ 6. Comp. fr. 3, § 10, fr. 20, § 3, fr.

28, pr. D. *de statulib.* (xl, 7).

§§ 7, 8. Comp. xxv, §§ 2, 18; Gai. ii,  
 §§ 263, 266, 267.

<sup>1</sup> The MS. has *iste cum*.

§§ 10, 11. Comp. Gai. ii, §§ 264, 265,  
 272.



- 12 tatio pro libertate fieri potest. Libertas sicut dari ita et adimi tam testamento quam codicillis testamento confirmatis potest; ut tamen eodem modo adimatur quo et data est.

[III. DE LATINIS.]

- 1 Latini ius Quiritium consequuntur his modis: beneficio principali, liberis, iteratione, militia, naue, aedificio, pistrino; praeterea ex senatusconsulto *ingenua* quae sit ter enixa.
- 2 Beneficio principali latinus ciuitatem Romanam accipit si ab
- 3 imperatore ius Quiritium impetrauerit. Liberis ius Quiritium consequitur latinus qui minor triginta annorum manumissionis tempore fuit. nam lege Iunia cautum est ut si

- 12 a money equivalent in lieu of freedom. As freedom can be conferred, so also can it be adeemed either by testament or by codicil confirmed by testament; only it must be adeemed in the same way in which it was given.

[III. OF LATINS.]

- 1 Latins acquire the *ius Quiritium* in these ways: by imperial grant, by children, by iteration, by service in the night watch, by ship-trading, by house-building, by flour-milling: so also, under the senatusconsult, does a *free-born latin* woman
- 2 who has thrice given birth to children. A latin acquires Roman citizenship by imperial grant if he have obtained the
- 3 *ius Quiritium* from the emperor on his own petition. By children a latin who was under thirty years old at the time of his manumission acquires the *ius Quiritium*. For it is

§ 12. Comp. xxiv, 29, and note 1; fr. 50, D. *de fideic. lib.* (xl, 5); fr. 14, pr. D. *de legat. II.* (xxx).

TIT. III, § 1. Comp. Gai. i, §§ 28-35. Acquisition of citizenship *aedificio* and *pistrino*, not further referred to by Vlp., are explained by Gai. in §§ 33, 34. As regards a woman *ter enixa*, the ms. has *uulgo quae sit ter enixa*. Most eds. retain the *uulgo*; one or two substitute *mulier*; and Sav. suggested *Volusiano*, a name he devised for the Set. immediately before alluded to. Nowhere is there any corroboration of the *uulgo*; and it is almost incredible that the law could thus have rewarded prostitu-

tion. In Paul. iv, 9, § 8, we read—*Latina ingenua, ius Quiritium consecuta si ter peperit, ad legitimam filii hereditatem admittitur; non est enim manumisea*. Not a hint of such a thing as illegitimacy; the whole stress is on the *ingenua*; according to him it was a woman that was a latin by birth, not by manumission, that became a citizen on her third accouchement,—for a triple birth at one confinement did not answer the purpose (Paul. iv, 9, § 2). Therefore for the *uulgo* of the ms. I have substituted *ingenua*.

§ 2. Comp. Gai. i, 34a; iii, 72.

§ 3. Comp. Gai. i, §§ 29-32.

ciuem Romanam uel latinam uxorem duxerit, testatione interposita quod liberorum quaerendorum causa uxorem duxerit, postea filio filiae nato natae et anniculo facto, possit apud praetorem uel praesidem prouinciae causam probare et fieri ciuis Romanus, tam ipse quam filius filiae eius et uxor, scilicet si et ipsa latina sit; nam si uxor ciuis Romana sit, partus quoque ciuis Romanus est ex senatusconsulto quod  
4 auctore *diuo Hadriano* factum est. Iteratione fit ciuis Romanus qui, post latinitatem quam acceperat maior triginta annorum, iterum iuste manumissus est ab eo cuius ex iure Quiritium seruus fuit. sed huic concessum est ex senatus-  
5 consulto etiam liberis ius Quiritium consequi.<sup>1</sup> Militia ius Quiritium accipit latinus [*si*] inter uigiles Romae sex annis militauerit, ex lege Visellia. praeterea ex senatusconsulto concessum est ei ut si triennio inter uigiles militauerit ius  
6 Quiritium consequatur. Naue latinus ciuitatem Romanam accipit si non minorem quam decem milium modiorum nauem fabricauerit et Romam sex annis frumentum portauerit, ex edicto diui Claudii.

provided by the Junian law that if he have taken to wife either a Roman citizen or a latin, declaring before witnesses that he was marrying in order that he might get children, he may, after the birth of a son or daughter, and when it has completed its first year, show cause before the praetor or provincial governor, and thus not only himself become a Roman citizen, but also his child and his wife,—these, of course, only if the wife too be a latin; for if she be a Roman citizen, then, in terms of Hadrian's senatusconsult, her  
4 child is born a citizen. By iteration he becomes a Roman citizen who, having been made a latin after he had passed the age of thirty, is anew formally manumitted by the person who had the quiritarian right in him when a slave. But by senatusconsult it is allowed even to such a latin to acquire  
5 citizenship by children. A latin acquires the *ius Quiritium* by military service, under the Visellian law, when he has done duty in Rome for six years in the night watch. A later senatusconsult concedes it to him on three years' service.  
6 By an edict of the late emperor Claudius', a latin acquires citizenship *naue* who has built a ship capable of carrying not less than 10,000 pecks, and has imported corn in it to Rome for six years.

§ 4. Comp. Gai. i, 35. § 5. Comp. Gai. i, 32b.  
1 This Sct. referred to by Gai. i, 31. § 6. Comp. Gai. i, 32c.

## [III. DE HIS QVI SVI IVRIS SVNT.]

- 1 Sui iuris sunt familiarum suarum principes, id est pater familiae itemque mater familiae.
- 2 Qui matre quidem [*certa*],<sup>1</sup> patre autem incerto nati sunt, spurii appellantur.

## [V. DE HIS QVI IN POTESTATE SVNT.]

- 1 In potestate sunt liberi parentum ex iusto matrimonio nati.
- 2 Iustum matrimonium est si inter eos qui nuptias contrahunt conubium sit, et tam masculus pubes quam femina potens sit, et utrique consentiant si sui iuris sunt, aut etiam parentes
- 3 eorum si in potestate sunt. Conubium est uxoris iure

## [IV. OF PERSONS SVI IVRIS.]

- 1 Those are *sui iuris* who are the heads of their own families, —the *paterfamilias*, that is to say, and the *materfamilias*.
- 2 Children of a known mother but unknown father are called spurious.

## [V. OF PERSONS IN POTESTATE.]

- 1 Children who are the issue of a marriage approved by the *ius civile* are in the *potestas* of their parents.
- 2 A marriage is *iustum* [*i.e.* approved by the *ius civile*] when there is *conubium* between the contracting parties, when the man has reached puberty and the woman become marriageable, and when both of them if *sui iuris*, or their parents if
- 3 they be *in potestate*, give their consent. *Conubium* is capa-

TIT. IV, § 1. Comp. Vlp. in fr. 195, § 2, D. de V. S. (l, 16). *Paterfamilias* did not necessarily involve the idea of paternity; *materfamilias*, as used in the text, never involved that of maternity. That man was *paterfamilias* who was not subject to any ascendant, either because nonesurvived or because he had been emancipated; he needed not to have wife or children, and might himself be a mere infant. So with a woman; she did not require to be a wife, nor yet the mother of children; she might be wife and mother, and yet herself be *filiæfamilias*; if married, but not *in manu*, she was not a member of her husband's family, and her children were never members of hers; if independent, she was *familiae suae et caput et finis*.

§ 2. Comp. v, 7, and refs.

<sup>1</sup> Added by all eds.

TIT. v, § 1. Comp. Gai. i, 55, and note 1.

§ 2. Comp. Gai. i, §§ 56 f.

§ 3. Comp. Serv. in *Aen.* i, 73. The definition in the text is unsatisfactory, for it confines the idea to the man. Like *commercium* (xix, 5, note), the word might be employed either abstractly, concretely, or relatively. Abstractly, a person was said to have *conubium* who was qualified to enter into a *matrimonium iuris civilis* in the absence of other impediments; in this sense every Roman citizen had it, although he might not have it in the concrete, as, for example, when he was a child of tender years and too

4 ducendae facultas. Conubium habent ciues Romani cum  
 ciuibus Romanis; cum latinis autem et peregrinis ita si con-  
 5 cessum sit. Cum seruis nullum est conubium. [6] Inter  
 6 parentes et liberos infinite<sup>1</sup> cuiuscumque gradus [*sint*] conu-  
 bium non est. inter cognatos autem ex transuerso gradu  
 olim quidem usque ad quartum gradum<sup>2</sup> matrimonia contrahi  
 non poterant: nunc autem etiam ex tertio gradu<sup>2</sup> licet uxo-  
 rem ducere, sed tantum fratris filiam, non etiam sororis filiam  
 aut amitam uel materteram, quamuis eodem gradu sint. *eam*  
*quae*<sup>3</sup> nouerca uel priuigna uel nurus uel socrus nostra fuit,  
 7 [*uxorem*]<sup>4</sup> ducere non possumus. Si quis eam quam non

4 city for marrying a wife according to law. Roman citizens  
 have it with Roman citizens; with latins and peregrins only  
 5 when these have had it specially conceded to them. With  
 6 slaves there is no *conubium*. Nor is there *conubium* be-  
 tween ascendants and descendants, however distant the degree  
 of relationship. Formerly marriage could not be contracted  
 between persons related collaterally as far as the fourth degree.  
 Now, however, a man may take as his wife a woman related  
 to him even in the third degree; but only his brother's  
 daughter,—not his sister's, nor yet his father's or mother's  
 sister, although they are in the same degree. Nor can we  
 marry her who has been our step-mother, step-daughter,  
 7 daughter-in-law, or mother-in-law. If a man marry a woman

young to marry. But though a citizen had *conubium* in the abstract, yet as a rule he had it not relatively with a Junian latin, say, or a peregrin (§ 4), for these last did not possess it in the abstract. And even though both parties had it in the abstract, they might not have it relatively and *inter se*; as when marriage between them was excluded on account of propinquity or affinity (§ 6). In the sense therefore in which the word is used in the text it would have been better defined as right of intermarriage.

<sup>1</sup> Bk. regards this word as a gloss.

<sup>2</sup> The degree of relationship between two individuals was determined by counting upwards from the first to the common ancestor and down again to the second, each generation each way marking a degree. Thus first cousins were related in the fourth degree, each being removed two generations or degrees from their grandfather as common ancestor. By the same mode of calculation uncle and niece were related in the third degree. See pr. § 7, I. *de grad. cogn.* (iii, 6).

<sup>3</sup> This is the reading of the *Collat.*; the ms. has *eademque uxore*.

<sup>4</sup> From the *Collat.*; omitted in the ms., or erroneously imported into the preceding line, as mentioned in last note.

§ 7. Comp. iv, 2; *Collat.* vi, 2, § 4; Gai. i, 64.

§ 4. Comp. Gai. i, 56.

§ 5. Hu. in his edition of Gai. introduces a similar statement in a par. which he numbers i, 57a. Comp. Paul. ii, 19, § 6.

§ 6. Reproduced in the *Collat.* vi, 2, §§ 1-3, where they are attributed to 'Vlpianus, libro regularum singulari, sub titulo de nuptiis.' Comp. Gai. i, §§ 59-63.



licet uxorem duxerit, incestum matrimonium contrahit: ideoque liberi in potestate eius non fiunt, sed quasi uulgo<sup>1</sup> concepti spurii sunt.

- 8 Conubio interueniente liberi semper patrem sequuntur: non interueniente conubio matris conditioni accedunt, excepto eo qui ex peregrino et ciue Romana peregrinus nascitur,<sup>1</sup> quoniam lex Minicia<sup>2</sup> ex alterutro peregrino natum deterioris parentis condicionem sequi iubet. Ex ciue Romano et latina latinus nascitur, et ex libero et ancilla seruus; quoniam, cum his casibus conubia non sint, partus sequitur
- 10 matrem. In his qui iure contracto matrimonio nascuntur conceptionis *tempus spectatur*:<sup>1</sup> in his autem qui non legitime concipiuntur, editionis. ueluti si ancilla conceperit, deinde manumissa pariat, liberum parit; nam quoniam non legitime concepit, cum editionis tempore libera sit, partus quoque liber est.

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whom it is not lawful for him to marry, his marriage is incestuous; his children therefore are not in his *potestas*, but are spurious, as if conceived in promiscuous intercourse.

- 8 If there be *conubium* between the parents the children always follow the father. In the absence of *conubium* they follow the condition of the mother, except that the issue of a peregrin father and Roman citizen mother is by birth a peregrin; for the Minician law ordains that a child born of parents of whom either is a peregrin shall take his status
- 9 from the inferior one. The child of a Roman citizen father and a latin mother is a latin, and the child of a free man and a slave woman is a slave; for, as in these cases there is no *conubium* between the parents, the child follows its mother's
- 10 condition. In the case of the issue of a marriage contracted according to law, it is the date of conception that is referred to [in determining their status], but when they have been conceived illegitimately it is the time of their birth. Consequently if a slave have conceived, but be manumitted before her confinement, it is to a freeman that she gives birth; for although she conceived illegitimately, yet as she was free at the time of her delivery, her child also is free.

<sup>1</sup> See Gai. i, 64, note 2.

§ 8. Comp. Gai. i, §§ 78, 67.

<sup>1</sup> As regards the issue of a latin father and Roman mother, see above, iii, 3.

<sup>2</sup> *Mensia* in the ms.; see Gai. i,

78, note.

§ 9. Comp. Gai. i, §§ 79, 82.

§ 10. Comp. Gai. i, §§ 89-92.

<sup>1</sup> So most eds.; the ms. has *tempore expectatur*; Bk. and Vahl. *tempore disceptatur*.

## [VI. DE DOTIBVS.]

- 1 Dos aut datur, aut dicitur, aut promittitur. [2] Dotem  
 2 dicere potest mulier quae nuptura est, et debitor mulieris  
 si iussu eius dicat; *item*<sup>1</sup> parens mulieris uirilis sexus per  
 uirilem sexum cognatione iunctus, uelut pater auus paternus.  
 dare, promittere dotem omnes possunt.  
 3 Dos aut profecticia dicitur, id est quam pater mulieris dedit;  
 aut aduenticia, id est ea quae a quouis alio data est.  
 4 Mortua in matrimonio muliere dos a patre profecta ad  
 patrem reuertitur, quintis in singulos liberos in infinitum  
 relictis penes uirum. quod si pater non sit, apud maritum  
 5 remanet. Aduenticia autem dos semper penes maritum  
 remanet, praeterquam si is qui dedit ut sibi redderetur stipu-  
 latus  *fuerit*; quae dos specialiter recepticia dicitur.

## [VI. OF DOWRIES.]

- 1 A dowry is either given, or specified, or promised. [2] It  
 2 may be specified by the woman about to marry or any debtor  
 of hers doing so on her instructions; as also by any male  
 ascendant of hers related to her through males, such as her  
 father or paternal grandfather. Any person whatever can  
 give or promise it.  
 3 A dowry is either profectitious, that is, given by the  
 woman's father, or adventitious, given by some other person.  
 4 If a woman die during the subsistence of her marriage the  
 dowry advanced by her father reverts to him, a fifth being  
 retained by the husband for each of the children until ex-  
 hausted. If the father be dead the whole remains with the  
 5 husband. But an adventitious dowry always remains with  
 the husband, unless the person who gave it have expressly  
 stipulated that it shall be returned to him; such a dowry is  
 called specifically receptitious.

TIT. VI, §§ 1, 2. On *dotis dictio*, see Gai. iii, 96, note. *Dotem dare* was to constitute a dowry by instant transfer to the husband; *promittere* to constitute it by stipulatory promise. In the later law it might be promised informally by what was called *nuda pollicitatio*; see l. 6, C. de dot. prom. et nuda pollicit. (v, 11).

<sup>1</sup> The ms. has *institutus*.  
 § 3. Comp. Vlp. in fr. 5, D. de iure dot. (xxiii, 3). In § 11 of that fr. Vlp. observes — *non ius potestatis sed parentis nomen dotem profecticiam*

*facit*; therefore a dowry for an emancipated daughter was as much *profecticia* as one for a *filiafamilias*, if given by the woman's father as a parental duty; if, however, he was indebted to his daughter, and gave it as her debtor and by her desire, it was *aduenticia*.

§ 4. Comp. Paul. in Fr. Vat. § 108.

§ 5. Comp. below, xvi, 4, note 2; Inst. in l. 1, § 13, C. de rei ux. act. (v, 13). On *dos recepticia*, see Gai. in fr. 31, § 2, D. de mort. c. don. (xxxix, 6).

- 6 Diuortio facto, si quidem sui iuris sit mulier, ipsa habet actionem, id est dotis repetitionem; quodsi in potestate patris sit, pater adiuncta filiae persona habet actionem *rei uxoriae*;<sup>1</sup>
- 7 nec interest aduenticia sit dos an profecticia. Post diuortium defuncta muliere heredi eius actio non aliter datur quam si moram in dote mulieri reddenda maritus fecerit.
- 8 Dos si pondere numero mensura contineatur, annua bima trima die redditur, nisi si ut praesens reddatur conuenerit. reliquae dotes statim redduntur.
- 9 Retentiones ex dote fiunt [*aut propter liberos*],<sup>1</sup> aut propter mores, aut propter impensas, aut propter res donatas, aut
- 10 propter res amotas. Propter liberos retentio fit si culpa mulieris aut patris cuius in potestate est diuortium factum

- 6 On divorce, if the woman be *sui iuris*, she herself is entitled to sue for its recovery; if *in potestate*, her father raises the *actio rei uxoriae*, she being joined with him in the suit; and it is immaterial whether the dowry be adventitious or profectitious. If the woman die after divorce her heir is not entitled to sue unless her husband have been guilty of culpable delay in restoring the dowry to her.
- 8 A dowry made up of things that pass by weight, number, or measure, is restored in instalments at the end of the first, second, and third year [after the dissolution of the marriage], unless there have been an agreement for its immediate restitution. Other dowries are restored at once.
- 9 Retentions out of a dowry are competent either on account of children, on account of immorality, on account of outlays, on account of things donated, or on account of things abstracted. There is retention on account of children when divorce has occurred through the fault of the wife or her *pater*-
- § 6. Comp. Vlp. in fr. 2, D. *sol. matr.* (xxiv, 3); Fr. Vat. §§ 116, 119; l. 1, § 13, C. *de rei ux. act.* (v, 13).  
<sup>1</sup> So Cuj. and most eds.; the ms. has *reuera*,—probably an erroneous rendering by the copyist of the abbreviation *r.u.* A few eds. transpose the words, placing them (as is more appropriate) after the first *habet actionem*. Others, again, insert them in both places.
- § 7. Comp. fr. 57, D. *sol. matr.* (xxiv, 3); l. 1, § 4, C. *de rei ux. act.* (v, 13).
- § 8. Comp. below, § 13; fr. 14-16, D. *de pact. dot.* (xxiii, 4); fr. 1, § 2, D. *de dote praeleg.* (xxxiii, 4); l. 1, § 7, C. *de rei ux. act.* (v, 13).
- § 9. Comp. Fr. Vat. § 120; fr. 5, D. *de dote praeleg.* (xxxiii, 4); l. 1, § 5, C. *de rei ux. act.* (v, 13). As regards *retentio propter res donatas*, comp. Fr. Vat. § 103; fr. 66, § 1, D. *de don. inter uir. et ux.* (xxiv, 1). As regards that *propter res amotas*, see vii, 2; tit. D. *de act. rer. amotar.* (xxv, 2); tit. C. *rer. am.* (v, 21).  
<sup>1</sup> Not in the ms., but inserted by all eds. on the strength of § 10.
- § 10. Comp. Boeth. in Cic. *Top.* ii, 4, § 19, on the authority of 'Paulus, *Institutionum libri secundi titulo de dotibus*' (Bruns, p. 295); vi, 17, § 65 (Bruns, same page); Fr. Vat. §§ 105-107.

- sit: tunc enim singulorum liberorum nomine sextae retinentur ex dote; non plures tamen quam tres. Sextae in retentione sunt, non in petitione; [*nam*] dos quae semel functa est amplius fungi non potest, nisi *aliud* matrimonium sit.
- 12 Morum nomine grauiorum quidem sexta retinetur,<sup>1</sup> leuiorum autem octaua. grauiores mores sunt adulteria tantum, leuiiores omnes reliqui. Mariti mores puniuntur in ea quidem dote quae a die<sup>1</sup> reddi debet, ita [*ut*] propter maiores mores praesentem dotem reddat, propter minores senum mensum die.

- familias*; in such a case a sixth part is retained on behalf of each child, but not more than three sixths in all. Those sixths, though they may be retained, cannot be recovered by action; for a dowry, once it has fulfilled all its purposes, cannot be further dealt with as such except in another marriage.
- 12 On account of gross immorality, *mores grauiiores*, there is retention of a sixth; for less serious, *mores leuiiores*, of an eighth. Adultery is the only immorality falling under the head of *mores grauiiores*; any other misconduct is included amongst the *leuiiores*. Immorality on the part of a husband is punished, in the case of a dowry repayable by instalments, by requiring him to make immediate restitution if his mis-

§ 11. The first six words of this par. are usually thrown into § 10. The remainder of it has been the subject of much comment. Many eds. profess themselves unable to understand its purport, and most hold it to be out of place. Schill. (*Bemerk.* pp. 369-375) seems to have given a fairly satisfactory explanation of it. It is intended to assign a reason for the *sextae in retentione sunt, non in petitione*; and the interpolation of *nam* or *quia* after these words makes it quite simple.

If, on the dissolution of a marriage by divorce, the husband had paid over the dowry without deducting any sixths to which he was entitled, he could not afterwards recover them by action. They were to come out of the *dos*; but this no longer existed as such once it had fulfilled all its purposes and been restored to the party entitled to it. It might again become a dowry in connection with a subsequent marriage; but as regarded that which had been dissolved by divorce it no longer had any such character,

and therefore could not be affected by an action instituted for payment of the sixths which might lawfully have been deducted from it before restitution.

- § 12. Comp. fr. 39, D. *sol. matr.* (xxiv, 3); fr. 11, § 3, D. *de adult.* (xlviii, 5); tit. C. 1<sup>h</sup>. *de repud.* (iii, 16); l. 7, l. 8, l. 11, C. *de repud.* (v, 17).

<sup>1</sup> So Cuj. and most eds. The ms. has *sextae retinentur*, which Hu. retains on the ground of the insufficiency of one-sixth as a penalty, and on the strength of a case recorded by Valer. Max. (viii, 2, § 3) in which a husband deprived his wife of her whole dowry because of her *impudicitia*. But Hu. omits to notice that, on proceedings by the wife, the husband was held to have acted illegally, and was compelled to restore it without any deduction.

- § 13. See refs. in note to last par.

<sup>1</sup> So the ms. Cuj. in his *Notae* preferred *annua bima trima die* (§ 11), and in his *Observ.* (vii, 20) suggested *annua die*; Bk. has *ad diem*; Hu. *annua die*.



in ea autem quae praesens reddi solet, tantum ex fructibus iubetur reddere quantum in illa dote quae triennio<sup>2</sup> redditur *repraesentatio*<sup>3</sup> facit.

- 14 Impensarum species sunt tres: aut enim necessariae dicun-  
 15 tur aut utiles aut uoluptuosae. Necessariae sunt impensae  
 quibus non factis dos deterior futura est, uelut si quis ruinosas  
 16 aedes refecerit. Utiles sunt quibus non factis quidem deter-  
 17 ior dos non fuerit, factis autem fructuosior effecta est,  
 ueluti si uineta et oliueta fecerit. Voluptuosae sunt quibus  
 neque omissis deterior dos fieret neque factis fructuosior effecta  
 est; quod euenit in uiridianis et picturis similibusque rebus.

[VII. DE IVRE DONATIONVM INTER VIRVM ET VXOREM.]

- 1 Inter uirum et uxorem donatio non ualet nisi certis ex

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conduct amount to adultery, and in six months if it be less serious: where it is returnable at once, he must pay in addition, out of the fruits and profits, a sum equal to the difference in value between instant repayment and repayment in three annual instalments.

- 14 Of outlays there are three varieties; they are described as  
 15 either necessary, useful, or pleasure-giving. Those outlays  
 are necessary by whose omission the dowry would be diminished in value,—expenditure, for instance, in repairing a  
 16 house going to ruin. Those are useful whose omission does  
 not indeed render the dowry less valuable, but whose dis-  
 bursement makes it more profitable, as when land is laid out  
 17 in vineyards or olive plantations. Those are pleasure-  
 giving whose omission will not render the dowry less valuable,  
 but whose disbursement will not make it more profitable; such  
 is the case with [expenditure on] pleasure-grounds, pictures,  
 and such like.

[VII. OF THE LAW OF DONATIONS BETWEEN HUSBAND  
 AND WIFE.]

- 1 A donation between husband and wife is invalid except in

<sup>2</sup> So Hugo and all subsequent eds.; the ms. and earlier editions have *quadriennio*.

<sup>3</sup> So Cuj. and most eds.; the ms. has *repensatio*, which Bk. and Vahl. retain. Comp. Vlp. in fr. 1, §§ 2, 12, fr. 2, pr. D. *de dote praeleg.* (xxxiii, 4).

§§ 14-17. Comp. § 37, I. *de act.* (iv, 6);

fr. 79, D. *de V. S.* (l, 16); fr. 1, fr. 5, fr. 7, fr. 14, D. *de impens.* (xxv, 1); l. 1, § 5, C. *de rei ux. act.* (v, 13).

TIT. VII. This rubric is obviously inappropriate, and due—as most of them are—either to the epitomist or some transcriber of his original. The contents of the first two pars.

causis, id est mortis causa, diuortii causa, serui manumittendi gratia. hoc amplius principalibus constitutionibus concessum est mulieri in hoc donare uiro suo, ut is ab imperatore lato clauo<sup>1</sup> uel equo publico<sup>2</sup> similiue honore honoretur.

2 Si maritus<sup>1</sup> diuortii causa res amouerit,<sup>2</sup> rerum quoque<sup>1</sup> amotarum actione tenebitur.

3 Si maritus pro muliere se obligauerit uel in rem eius in-penderit, diuortio facto eo nomine cauere sibi solet stipulatione tribunicia.

4 In potestate parentum sunt etiam hi liberi quorum causa

a few cases, namely, when made in prospect of death, in prospect of divorce, or to procure the manumission of a slave. Further, by imperial constitutions a woman is allowed to make a gift to her husband to enable him to obtain from the emperor the distinction of senatorial or equestrian rank, or some other honour of that sort.

2 If a husband have theftuously abstracted anything of his wife's in prospect of divorce, he also is responsible in an *actio rerum amotarum*.

3 If a husband have become bound for his wife, or have spent money upon her property, it is usual for him, in the event of divorce, to secure himself in respect thereof by a tribunician stipulation.

4 Those children also are in the *potestas* of their parents on

clearly indicate that Vlp. had gone on to explain the *retentiones propter res donatas* and *res amotas*, and that it was in illustration of the first that he mentioned the matter of donations between husband and wife. Pars. 2-4 have nothing to do with it.

§ 1. Comp. Paul. ii, 23; fr. 1, fr. 40, fr. 42, fr. 60, § 1, D. *de donat. inter uir.* (xxi, 1).

<sup>1</sup> The *latus clauus* was a broad perpendicular band or stripe of purple sewed on the tunic from the throat downwards, and one of the badges of senatorial rank; see Smith's D. G. R. A. v. *Clauus latus*.

<sup>2</sup> *Equo publico honoratus* is a phrase that occurs in many inscriptions as indicative of admission to the ranks of the *equites*.

§ 2. Comp. fr. 1, fr. 7, D. *de act. rer. amotar.* (xxv, 2). The husband's action against his wife on this ground is much more frequently alluded to in the texts; and Ulpian's

*quoque* suggests that he had referred to it in the first instance, although the reference has disappeared.

<sup>1</sup> So in the ms. M. and Hu. think it should be *mulier* or *uxor*. As the texts referred to show, it was competent to either party.

<sup>2</sup> The ms. has *mouerit*.

§ 3. Comp. fr. 25, § 4, fr. 55, D. *sol. matr.* (xxv, 2). When, on divorce, a man was sued for restitution of a dowry in respect of which he, as its owner during the marriage, had incurred obligations to third parties, he was entitled to require that his wife should first give him an undertaking of relief. This was done by a stipulation, which Vlp. calls tribunician, probably because sanctioned originally by the plebeian tribunes, who were not without a limited *iurisdictio*. Comp. fr. 2, § 34, D. *de O. I.* (i, 2).

§ 4. Vlp. here reverts to his proper subject-matter, — creation of the

probata est, per errorem contracto matrimonio inter disparis *condicionis personas*:<sup>1</sup> nam siue ciuis Romanus latinam aut peregrinam uel eam quae dediticiorum numero est quasi [*ciuem Romanam*]<sup>2</sup> per ignorantiam uxorem duxerit, siue ciuis Romana per errorem peregrino uel ei qui dediticiorum numero est [*quasi ciui Romano*]<sup>2</sup> aut etiam quasi latino ex lege *Aelia Sentia* nupta fuerit, causa probata ciuitas *Romana datur*<sup>3</sup> tam liberis quam parentibus, praeter eos qui dediticiorum numero sunt; et ex eo fiunt in potestate parentum liberi.

## [VIII. DE ADOPTIONIBVS.]

- 1 Non tantum naturales liberi in potestate parentum sunt  
2 sed etiam adoptiui. Adoptio fit aut per populum aut per praetorem uel praesidem prouinciae. illa adoptio quae per

whose behalf cause [of error] has been proved when a marriage has been contracted by mistake between persons of unequal condition; for whether it be a Roman citizen that in ignorance has taken to wife a latin or a peregrin or a woman of deditician condition, believing that he was marrying a citizen; or a woman who is a Roman citizen that by mistake has given herself in marriage to a peregrin or a man of the deditician class, believing him to be a Roman citizen, or even believing him to be a latin whom she was marrying in terms of the *Aelia-Sentian* law,—on the cause [of error] being proved Roman citizenship is granted as well to the children as the parents, excepting those who are only dediticians; and thus the children pass into the *potestas* of their parents.

## [VIII. OF ADOPTIONS.]

- 1 It is not only natural but also adoptive children that are  
2 in the *potestas* of parents. Adoption is effected either by intervention of the people or by that of a praetor or prouincial governor. That effected by intervention of the people

*patria potestas*. For it arose either from marriage, tit. v (to which the law of dowries, vi, vii, 3, is an appendix); or *causae probatio*, vii, 4; or adoption, tit. viii. With this par. comp. Gai. i, §§ 65-75.

<sup>1</sup> So Hugo and most subsequent eds.; the ms. has *dispare condignis personarum*; Cuj. *dispare con-*

*dignis personas*; later eds. before Hugo *dispare condicione personas*.

<sup>2</sup> Omitted from the ms.

<sup>3</sup> The ms. has *reddatur*; obviously a mistake of the copyist in transcribing *r.* (= *Romana*) *datur*.

TIT. VIII. See note to vii, 4.  
§§ 1-5. Comp. Gai. i, §§ 97-102.

3 populum fit, specialiter adrogatio dicitur. Per populum qui  
 sui iuris sunt adrogantur; per praetorem autem filii familiae a  
 4 parentibus dantur in adoptionem. Adrogatio Romae *dum-*  
*taxat*<sup>1</sup> fit; adoptio autem etiam in prouinciis apud praesides.  
 5 Per praetorem uel praesidem prouinciae adoptari tam mas-  
 culi quam feminae, et tam puberes quam impuberes possunt.  
 per populum uero Romanum feminae<sup>2</sup> non adrogantur; pupilli  
*ante* quidem<sup>3</sup> non poterant adrogari, nunc autem possunt ex  
 6 constitutione diui Antonini. Hi qui generare non possunt,  
 uelut spado, utroque modo possunt adoptare. idem iuris est  
 7 in persona caelibis. Item is qui filium non habet in  
 8 locum nepotis adoptare potest. Si pater familiae adrogan-  
 dum se dederit, liberi quoque eius quasi nepotes in potestate  
 8a fiunt adrogatoris. Feminae uero neutro modo possunt  
 adoptare, quoniam nec naturales liberos in potestate habent.

3 is specifically called adrogation. It is persons *sui iuris*  
 that are adrogated by the people's authority; *filii familias*  
 are given in adoption by their parents by authority of the  
 4 praetor. Adrogation can take place only in Rome; but  
 adoption may take place even in the provinces before the  
 5 governors. Both males and females, and whether puberate  
 or impuberate, may be adopted by authority of a praetor or  
 governor of a province. But women cannot be adrogated by  
 co-operation of the Roman people; neither in former days  
 could pupils, although now they may according to one of the  
 6 constitutions of the late emperor Antoninus [Pius]. Those  
 who are unable to procreate, such as eunuchs, may adopt  
 by either mode. The rule is the same in the case of an  
 7 unmarried person. Further, he who has no son may adopt  
 8 [a child] in the character of a grandson. When a *pater-*  
*familias* gives himself in adrogation, his children also fall  
 under the *potestas* of the adrogator in the character of grand-  
 8a children. But women cannot adopt by either method,  
 for they have not even their natural children *in potestate*.

<sup>1</sup> So L. and most subsequent eds.; a few have *tantum*; the ms. has *data*,—a corruption by the copyist, as L. suggests, of the abbreviation *dt*.

<sup>2</sup> The ms. has *feminae quidem*. The last word, though apparently an addition by another hand, has been accepted by most eds.; M., however, rejects it.

<sup>3</sup> So the earliest editions, and now M. The ms. has *aut quidem*. Bk. (in his later editions) reads *pupilli autem quondam*; Vahl., following Schill., *pupilli autem olim quidem*; Hu. *pupilli qui [olim] item*.

§ 6. Comp. Gai. i, 103.

§ 7. Comp. § 5, I. *de adopt.* (i, 11).

§ 8. Comp. Gai. i, 107.

§ 8a. Comp. Gai. i, 104.



## [VIII. DE HIS QVI IN MANV SVNT.]

Farreo conuenit uxor in manum certis uerbis et testibus x praesentibus et sollemni sacrificio facto, in quo panis quoque farreus adhibetur.

## [X. QVI IN POTESTATE MANCIPIOVE SVNT QVEMADMODVM EO IVRE LIBERENTVR.]

- 1 Liberi parentum potestate liberantur emancipatione, id est si posteaquam mancipati fuerint manumissi sint. sed filius quidem ter mancipatus ter manumissus sui iuris fit; id enim lex duodecim tabularum iubet his uerbis: 'si pater filium ter uenumdauit,' filius a patre liber esto.' ceteri autem liberi praeter filium, tam masculi quam feminae, una mancipatione
- 2 manumissioneque sui iuris fiunt. Morte patris filius et filia sui iuris fiunt: morte autem aui nepotes ita demum sui iuris

## [IX. OF THOSE WHO ARE IN MANU.]

There is *conuentio in manum farreo* by exchange of certain words in the presence of ten witnesses, and the offering of a solemn sacrifice, in which a spelt cake plays a part.

## [X. HOW PERSONS IN POTESTATE OR IN MANCIPIO ARE LIBERATED THEREFROM.]

- 1 Descendants are freed from the *potestas* of ascendants by emancipation, that is, when they are manumitted after having been mancipated. A son indeed becomes *sui iuris* only when thrice mancipated and thrice manumitted; so the Twelve Tables ordain in these words: 'If a father have thrice sold his son, the son shall be free from his father.' But other descendants than sons, males as well as females, become *sui*
- 2 *iuris* by one mancipation and one manumission. Sons and daughters become *sui iuris* by the death of their father; grandchildren, however, become *sui iuris* by the death of their

TIT. IX. Comp. Gai. i, 112. *Far* was a coarse kind of wheat, the *tritium spelta* of botanists. The epitomist has not preserved the account which Vlp. must doubtless have given of the other modes of creating *manus*; because when he compiled his abridgment it had ceased to be recognised except for sacred pur-

poses, which required confarreation (Gai. i, 136, and note).

TIT. X, § 1. Comp. Gai. i, 132.

<sup>1</sup> So the ms.; some eds. have *uenundabit*; others *uenumdruit* (as in Gai.).

§ 2. Comp. Gai. i, 127.

- fiunt si post mortem aui in potestate patris futuri non sunt, uelut si moriente auo pater eorum aut *iam*<sup>1</sup> decessit aut de potestate dimissus est: nam si mortis aui tempore pater eorum in potestate eius sit, mortuo auo in patris sui potestate
- 3 fiunt. Si patri uel filio aqua et igni interdictum sit patria potestas tollitur, quia peregrinus fit is cui aqua et igni interdictum est; neque autem peregrinus ciuem Romanum neque
- 4 ciuis Romanus peregrinum in potestate habere potest. Si pater ab hostibus captus sit, quamuis seruus hostium fiat, tamen cum reuersus fuerit omnia pristina iura recipit iure postliminii. sed quamdiu apud hostes est patria potestas in filio eius interim pendebit, et cum reuersus fuerit ab hostibus in potestate filium habebit; si uero ibi decesserit, sui iuris filius erit. Filius quoque si captus fuerit ab hostibus, similiter
- 5 propter ius postliminii patria potestas interim pendebit. In potestate parentum esse desinunt et hi qui flamines Diales inaugurantur et quae uirgines Vestae capiuntur.

- grandfather only when on that event they will not be in the *potestas* of their father, as for example when, at the time of their grandfather's death, their father is either already dead or released from *potestas*; for if, when the grandfather dies, the children's father is in the grandfather's *potestas*, by the death of the latter they become subject to the *potestas* of their
- 3 father. If either father or son be interdicted fire and water the *patria potestas* is put an end to; for a person to whom this happens becomes a peregrin; and neither can a peregrin have a Roman citizen in his *potestas*, nor a citizen a peregrin.
- 4 If a father be taken captive by an enemy, although he thereby becomes a slave of the enemy's, yet when he returns he recovers all his former rights *iure postliminii*. So long as he is in the enemy's hands his *potestas* over his son is for the time suspended; if he return home he will again have him *in potestate*; but if he die in captivity his son will be *sui iuris*. And so too if a son be captured by an enemy, the *potestas* of his father will in like manner be suspended for the
- 5 time on account of the *ius postliminii*. Those also cease to be *in potestate* who are consecrated as flamens of Jupiter or taken as Vestal virgins.

<sup>1</sup> The ms. and some eds. have *etiam*; we have *iam* in the passage of Gai. referred to.

§ 3. Comp. Gai. i, 128, and note 2.

§ 4. Comp. Gai. i, 129; below, xxiii, 5.

§ 5. Comp. Gai. i, §§ 130, 145.

## [XI. DE TUTELIS.]

- 1 Tutores constituuntur tam masculis quam feminis; sed masculis quidem inpueribus dumtaxat propter aetatis infirmitatem; feminis autem [*tam*] inpueribus quam puberibus, et propter sexus infirmitatem et propter forensium rerum ignorantiam.
- 2 Tutores aut legitimi sunt aut senatusconsultis constituti aut moribus introducti.
- 3 Legitimi tutores sunt [*qui*] ex lege aliqua descendunt; per eminentiam autem legitimi dicuntur qui ex lege duodecim tabularum introducuntur, seu *propalam*, quales sunt agnati,
- 4 seu per consequentiam, quales sunt patroni. Agnati sunt a patre cognati uirilis sexus<sup>1</sup> per uirilem sexum descendentes eiusdem familiae,<sup>2</sup> uelut patrum, fratres, filii fratris, patruels.
- 5 Qui liberum caput mancipatum sibi uel a parente uel a coemptionatore<sup>1</sup> manumisit, per similitudinem patroni tutor efficitur, qui fiduciarius tutor appellatur.

## [XI. OF TUTORIES.]

- 1 Tutors are appointed both to males and females: but to males only while under puberty, because of their infirmity of age; to females, however, both while under and over puberty, on account both of their infirmity of sex and ignorance of forensic matters.
- 2 Tutors are either tutors-at-law, or derive their office from a senatusconsult, or have had it introduced by custom.
- 3 Those are tutors-at-law, *legitimi*, who derive their office from some *lex*; but those are emphatically so called who owe it to the law of the Twelve Tables, either directly, such as agnates,
- 4 or by implication, as patrons. Agnates are persons of the male sex related through a common father, tracing their descent from him through males, and members of the same family; for example, paternal uncles, brothers, a brother's sons, a paternal uncle's sons.
- 5 He who has manumitted a free person, mancipated to him either by a parent or a coemptionator, becomes that person's tutor after the manner of a patron, and is called a fiduciary tutor.

TIT. XI, § 1. Comp. Gai. i, §§ 144, 189-193.

§ 2. *Legitimi*, §§ 3-20; *Scdis. constituti*, §§ 20-23; *moribus introducti*, § 24.

§ 3. Comp. Gai. i, §§ 155, 165.

§ 4. Comp. Gai. i, 156; iii, 10; below, xxvi, 1.

<sup>1</sup> This definition excludes female

agnates, no doubt because they could not be tutors.

<sup>2</sup> *Eiusdem familiae* means un-emancipated; for emancipation, as a *capitis minutio*, severed the bond of agnation (§§ 9, 13).

§ 5. Comp. Gai. i, 166.

<sup>1</sup> Comp. Gai. i, 115.

- 6 Legitimi tutores alii tutelam in iure cedere possunt.  
 7 Is cui tutela in iure cessa est cessicius tutor appellatur;  
 qui siue mortuus fuerit, siue capite minutus, siue alii tutelam  
 cesserit,<sup>1</sup> redit ad legitimum tutorem tutela. sed et si  
 legitimus decesserit aut capite minutus fuerit, cessicia  
 8 quoque tutela extinguitur. Quantum ad agnatos pertinet  
 hodie cessicia tutela non procedit, quoniam permissum erat in  
 iure cedere tutelam feminarum tantum, non etiam masculo-  
 rum; feminarum autem legitimas tutelas lex Claudia *sustulit*,<sup>2</sup>  
 excepta tutela patronorum.  
 9 Legitima tutela capitis deminutione amittitur. [10] Capi-  
 10 tis minutionis species sunt tres, maxima, media, minima.  
 11 Maxima capitis deminutio est per quam et ciuitas et libertas  
 amittitur, ueluti cum incensus aliquis uenierit, aut quod  
 mulier alieno seruo se iunxerit denuntiante domino, et ancilla  
 12 facta fuerit<sup>1</sup> ex senatusconsulto Claudiano. Media capitis  
 deminutio dicitur per quam, sola ciuitate amissa, libertas re-

- 6 A tutor-at-law may transfer his tutory to another person  
 7 by cession in court. He to whom it is ceded gets the name  
 of *tutor cessicius*. If he die, or be *capite minutus*, or cede the  
 tutory to a third party, it reverts to the tutor-at-law. And if  
 it is the latter that dies or is *capite minutus*, the *cessicia*  
 8 *tutela* then also comes to an end. So far as agnates are  
 concerned, there is now-a-days no room for a *cessicia tutela*;  
 for it never was lawful to cede a tutory over males, but only  
 that over females; and the Claudian law has abolished the  
 tutories-at-law over women, except that exercised by patrons.  
 9 A tutory-at-law is lost by *capitis deminutio*. [10] And  
 10 this is of three kinds,—the greatest, the intermediate, and the  
 11 smallest. That *capitis deminutio* is of the highest degree  
 in which both citizenship and liberty are lost, as when a man  
 is sold for avoiding enrolment in the census-list, or a woman  
 has become a slave under the Claudian senatusconsult,  
 because she has insisted in cohabiting with another person's  
 12 slave notwithstanding that person's warnings. That is said  
 to be of the intermediate degree in which, although citizen-  
 ship is lost, freedom is retained; it occurs on interdiction of

§§ 6-8. Comp. § 17; Gai. i, §§ 168-171.

<sup>1</sup> The ms. has *pcesserit*; hence many eds. read *porro cesserit*. K., following Roeder, in *iure* (*in i.*) *cesserit*. Following the earliest editions, I have dropped the initial letter.

<sup>2</sup> So Cuj. and all eds.; the ms. has *sustinet*.

§ 9. Comp. Gai. i, §§ 158, 195a.

§ 10-13. Comp. Gai. i, §§ 159-162.

<sup>1</sup> Hu. reads—*aut mulier, quod alieno seruo se iunxerit denuntiante domino eius, ancilla facta fuerit*.



- 13 tinetur; quod fit in eo cui aqua et igni interdicitur. Minima capitis deminutio est per quam, et ciuitate et libertate salua, status dumtaxat hominis<sup>2</sup> mutatur; quod fit adoptione et in manum conuentione.<sup>3</sup>
- 14 Testamento quoque nominatim tutores dati confirmantur eadem lege duodecim tabularum his uerbis: 'uti legassit super<sup>1</sup> pecunia tutelaue<sup>2</sup> suae rei,<sup>3</sup> ita ius esto:' qui tutores
- 15 datiui appellantur.<sup>4</sup> Dari testamento tutores possunt liberis
- 16 qui in potestate sunt. Testamento tutores dari possunt hi cum quibus testamenti faciendi ius est,<sup>1</sup> praeter latinum Iunianum; nam latinus habet quidem testamenti factionem, sed tamen tutor dari non potest; id enim lex Iunia prohibet.
- 17 Si capite deminutus fuerit<sup>1</sup> tutor testamento datus, non amittit tutelam; sed si abdicauerit<sup>2</sup> se tutela, desinit esse

13 fire and water. It is of the lowest degree when, without loss of either citizenship or liberty, there is simply a change in a person's domestic status, as happens in adoption and *in manum conuentio*.

- 14 Tutors appointed by name in a testament are also confirmed [*i.e.* have their appointment sanctioned] by the same law of the Twelve Tables in these words: 'As a man has legated in regard to his belongings, whether about property or tutory, so be it law;' such tutors are called dative.
- 15 Tutors may be appointed by testament to children *in potestate*
- 16 [of the testator]. Those persons may thus be appointed tutors with whom the testator has *testamenti factio*, except a Junian latin. For although it is true that a latin has *testamenti factio*, yet he cannot be appointed tutor; the Junian
- 17 law forbids it. If a testamentary tutor be *capite deminutus* he does not lose his tutory, but if he have abdicated he ceases

<sup>2</sup> *Homo* means the man rather than the citizen,—the individual in his private rather than his political character.

<sup>3</sup> The ms. has *in manu conditione*.  
§ 14. Comp. Gai. ii, §§ 224, 104, note 8.

<sup>1</sup> Bk., on the authority of Cic. *de inv.* ii, 50, § 148, interpolates *familia*.

<sup>2</sup> The ms. has *pecuniam tutelabae*.

<sup>3</sup> *Uti legassit suae rei* is the same thing as *uti legem dedisset suae rei*; the last two words are in the dative, not the genitive.

<sup>4</sup> Comp. Gai. i, 154.

§ 15. Comp. Gai. i, 144.

§ 16. Comp. Paul. in fr. 21, D. *de test. tut.* (xxvi, 2).

<sup>1</sup> See Gai. ii, 114, note 1; i, 23.

§ 17. Comp. above, § 7.

<sup>1</sup> Comp. § 9.

<sup>2</sup> Comp. Cic. *ad Att.* vi, 1, § 3. *Abdicatio* seems to have been renunciation of a tutory in course of administration. There is no trace of it either in Gai. or in the Justinianian law; indeed it seems quite inconsistent with the idea that pervades the whole of tit. I. *de excusat. tut.* (i, 25). *probably it was*

*lawful only in tutory of women and there alluded to a testamentary tutor on the same principle (noticed in Gai. i. 168) that was held to be justly erroneous by a later-lawyer.*

tutor: abdicare autem est dicere nolle se tutorem esse. in iure cedere<sup>3</sup> autem tutelam testamento datus non potest: nam et<sup>4</sup> legitimus in iure cedere potest, abdicare se non potest.

- 18 Lex Atilia iubet mulieribus pupillisue non habentibus tutores dari a praetore et maiore parte tribunorum plebis, quos tutores Atilianos appellamus. sed quia lex Atilia Romae tantum locum habet, lege Iulia et Titia prospectum est ut in prouinciis quoque similiter a praesidibus earum  
19 dentur tutores. Lex Iunia tutorem fieri iubet latinae uel latini inpueris<sup>1</sup> eum cuius etiam ante manumissionem *ex*  
20 *iure*<sup>2</sup> Quiritium fuit. Ex lege Iulia de maritandis ordinibus tutor datur a praetore urbis ei mulieri uirginiue quam ex hac ipsa lege nubere oportet, ad dotem dandam dicendam promittendamue,<sup>1</sup> si legitimum tutorem pupillum habeat. sed postea senatus censuit ut etiam in prouinciis quoque similiter  
21 a praesidibus earum ex eadem causa tutores dentur. Praeterea etiam in locum muti furiosiusue tutoris alterum dandum

to be tutor; (to abdicate is to intimate that he declines to be tutor). He cannot, however, transfer his tutory to another by cession in court; a tutor-at-law may, but he cannot abdicate.

- 18 The Atilian law ordains that tutors shall be appointed by the praetor and the majority of the plebeian tribunes to women and pupils who have none; and such tutors are called Atilian. But as this enactment does not extend beyond Rome, it is provided by the Julian and Titian law that in the provinces tutors shall be similarly appointed by the governors  
19 thereof. The Junian law ordains that a latin woman, or a male latin under *puberty*, shall have as tutors those to whom they belonged in quiritarian right previous to their manu-  
20 mission. By the Julian law for regulating the marriages of the orders, a tutor is appointed by the praetor to any woman or virgin required by that enactment to marry, on purpose to enable her to give, specify, or promise a dowry, when her tutor-at-law is a pupil [and therefore unable to grant his *auctoritas*]. Afterwards the senate decreed that in the provinces tutors should be similarly appointed for the same pur-  
21 pose by the provincial governors. The senate further decreed that where a tutor is dumb or insane another shall

<sup>3</sup> Comp. §§ 6-8.

<sup>2</sup> The ms., here as elsewhere, has *quī ius*.

<sup>4</sup> So most eds.; the ms. has *nā* et; M. suggests *tametsi*.

§ 20. Comp. Gai. i, §§ 178, 183, and note to §§ 173, 174.

§ 18. Comp. Gai. i, 185.

<sup>1</sup> Comp. vi, 1.

§ 19. Comp. Gai. i, 167; above, i, 16.

<sup>1</sup> The ms. has *latinis impuberibus*. § 21. Comp. Gai. i, 180.

- 22 esse tutorem ad dotem constituendam senatus censuit. Item  
ex senatusconsulto tutor datur mulieri ei cuius tutor abest,  
praeterquam si patronus sit qui abest: nam in locum patroni  
absentis *alter*<sup>1</sup> peti non potest nisi ad hereditatem adeundam  
et nuptias contrahendas. idemque permisit in pupillo patroni  
23 filio. Hoc amplius senatus censuit, ut si tutor pupilli  
pupillaeue suspectus a tutela submotus fuerit, uel etiam iusta  
de causa excusatus, in locum eius tutor alius [*detur*].<sup>1</sup>  
24 Moribus tutor datur mulieri pupillouae qui cum tutore suo  
lege<sup>1</sup> aut legitimo iudicio<sup>2</sup> agere uult, ut auctore eo agat,<sup>3</sup>  
(ipse enim tutor in rem suam<sup>4</sup> auctor fieri non potest), qui  
*praetorius*<sup>5</sup> tutor dicitur, quia a praetore urbis dari consuevit.  
25 Pupillorum pupillarumque tutores et negotia gerunt et  
auctoritatem interponunt; mulierum autem tutores auctori-  
26 tatem dumtaxat interponunt. Si plures sunt tutores, omnes

- be appointed in his place for the purpose of constituting a  
22 dowry. A tutor is also given under the senatusconsult  
to a woman whose tutor is absent, unless the absentee be her  
patron: for another tutor cannot be petitioned for [by a freed-  
woman] in place of an absent patron, except for the special  
purpose of enabling her to enter upon a succession or contract  
marriage. It sanctions the same course where a [deceased]  
23 patron's son is in pupillarity. Further, the senate has also  
decreed that if the tutor of a male or female pupil be removed  
as suspect, or for some good reason be excused, another shall  
be appointed in his place.  
24 By customary law a tutor is appointed to a woman or  
pupil who proposes to proceed against her [proper] tutor either  
by *legis actio* or in a *legitimum iudicium*, on purpose that he  
may be *auctor* in the suit,—for a tutor cannot be *auctor* in  
an affair of his own; and such an one is called a praetorian  
tutor, because it has been the custom for the urban praetor  
to make the appointment.  
25 The tutors of pupils, both male and female, both act for  
them and [act with them, *i.e.*] interpose *auctoritas*; but the  
26 tutors of women only interpose *auctoritas*. If there be

§ 22. Comp. Gai. i, §§ 173-177, 179.

<sup>1</sup> So most eds. The ms. has *al'ter*,  
which L., Bk., and Vahl. render  
*aliter*. Hu. reads *a liberta tutor*.

§ 23. Comp. Gai. i, 182.

<sup>1</sup> Supplied by all eds.

24. Comp. Gai. i, 184.

<sup>1</sup> Comp. Gai. iv, §§ 11, 12, 31.

<sup>2</sup> Comp. Gai. iv, 104.

<sup>3</sup> Comp. § 27.

<sup>4</sup> Comp. § 3, note 1, I. *de auct. tut.*  
(i, 21).

<sup>5</sup> The ms. has *praetorianus*; but  
see Gai.

§§ 25-27. Comp. Gai. i, §§ 190-192,  
and notes 1 and 2 to § 24, above.

in omni re debent auctoritatem accommodare, praeter eos qui *testamento*<sup>1</sup> dati sunt; nam ex his uel unius auctoritas sufficit.

27 Tutoris auctoritas necessaria est mulieribus quidem in his rebus: si lege aut legitimo iudicio agant, si se obligent, si ciuile negotium gerant, si libertae suae permittant in contubernio alieni serui morari,<sup>2</sup> si rem Mancipi alienent. pupillis autem hoc amplius etiam in rerum nec Mancipi alienatione tutoris auctoritate opus est.

28 Liberantur tutela masculi quidem pubertate. puberem autem Cassiani<sup>1</sup> quidem eum esse dicunt qui habitu corporis pubes apparet, id est qui generare possit; Proculiani<sup>1</sup> autem eum qui quattuordecim annos expleuit; uerum Priscus<sup>2</sup> eum puberem esse in quem utrumque concurrit, et habitus corporis  
28a et numerus annorum. Feminae autem tutela liberantur

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more than one tutor they must all grant their *auctoritas* in each particular transaction, unless they be testamentary tutors; in their case the *auctoritas* of any one of them is sufficient.

27 Tutorial *auctoritas* is needful for women in these matters: if they are suing in a *legis actio* or a *legitimum iudicium*, if they are undertaking an obligation, if they are taking part in any transaction of the *ius ciuile*, if they are granting permission to a freedwoman to cohabit with another person's slave, if they are alienating a *res Mancipi*. Over and above these cases it is necessary to pupils in alienation even of *res nec Mancipi*.

28 Males are released from tutelage by puberty. The Cassians hold that he has reached puberty who appears to have done so from his bodily development, *i.e.* who can procreate; the Proculians say that he has done so who has completed his fourteenth year; but Priscus maintains that he only is puberate in whom both those *indicia* occur,—bodily development and the aforesaid number of years. Women are released from it [*in right of three children; but if they be freed-women in the tutelage of a patron, only in right of four*].

<sup>1</sup> So Cuj. and most eds.; the ms. has *tunc*.

<sup>2</sup> Because her freedwoman, in terms of the *SC. Claudianum*, would fall to the owner of the slave with whom she was cohabiting; see Paul. ii, 21a, § 6.

<sup>2</sup> In fr. 10, § 2, D. *de usu et hab.* (vii, 2). Vlp. mentions Priscus, meaning, as is generally supposed, Iauolenus Priscus (Gai. iii, 70, note). Schill. (*Animadv.* iii, pp. 6-10) proposes *plerisque uisum est*; but the *Priscus* of the ms. is quite distinct.

§ 28. Comp. Gai. i, 196.

<sup>1</sup> See Gai. i, 196, note 1.

§ 28a. Incomplete in the ms. See



## [XII. DE CVRATORIBVS.]

- 1 Curatores aut legitimi sunt, id est qui ex lege duodecim tabularum dantur, aut honorarii, id est qui a praetore con-
- 2 stituuntur. Lex duodecim tabularum furiosum, itemque prodigum cui bonis interdictum est, in curatione iubet esse
- 3 agnatorum. A praetore constituitur curator quem ipse praetor uoluerit libertinis prodigis, itemque ingenuis qui ex testamento parentis heredes facti male dissipant bona: his enim ex lege curator dari non poterat, cum ingenuus quidem non ab intestato sed ex testamento heres factus sit patri; libertinus autem nullo modo patri heres fieri possit, qui nec patrem habuisse uidetur, cum seruilis cognatio<sup>1</sup> nulla sit.
- 4 Praeterea dat curatorem ei etiam qui nuper pubes factus idonee negotia sua tueri non potest.

## [XII. OF CURATORS.]

- 1 Curators are either *legitimi*, i.e. given by the law of the Twelve Tables, or *honorarii*, i.e. given by the praetor [at his
- 2 own hand]. The Twelve Tables ordain that a madman, as also a spendthrift who has been interdicted the administration of his estate, shall be under the curatory of his agnates.
- 3 To freedmen spendthrifts, as well as to persons of free-birth who, being testamentary heirs of their parents, are squandering their estates, the praetor appoints as curator any person he pleases. For neither of these two classes was a curator provided by the statute,—the man of free-birth because he was his father's heir by testament instead of *ab intestato*; the freedman because he could not be his father's heir either way, and in fact was regarded as having no father, there being no
- 4 such thing as servile cognation. The praetor also appoints a curator to an individual who, having only just passed the age of puberty, is still unable to look properly after his own affairs.

xxix, 3; Gai. i, §§ 194, 195. Hu. proposes — *Feminae autem tutela liberantur [trium liberorum iure; libertae tantum, quae in patroni tutela sunt, quattuor liberorum iure ab ea liberantur]*.

TIT. XII. Comp. Gai. Epit. i, 8 (in note to Gai. i, §§ 197, 198).

§ 2. Comp. Cic. *de inv.* ii, 50, § 148; *Tusc. disp.* iii, 5, § 11; Hor. *Sat.* ii, 3, 218; Fest. v. *Nec* (Bruns, p. 248); Schoell, *Tab.* v, 7; Gai. ii,

64; below, xx, 13; Vlp. in fr. 1, pr. D. *de cur. fur.* (xxvii, 10).

§ 3. Comp. Val. Max. viii, 6, § 1; Gai. i, 53; Paul. iii, 4a, § 7; below, xx, 13.

<sup>1</sup> That for certain purposes the law always recognised *seruilis cognatio* appears from § 10, I. *de nupt.* (i, 10); and from § 10, I. *de grad. cogn.* (iii, 6), it will be seen that Just. recognised it as creative of a right of succession.

§ 4. Comp. Gai. i, §§ 197, 198, and refs.

## [XIII. DE CAELIBE ORBO ET SOLITARIO PATRE.]

- 1 Lege Iulia prohibentur uxores ducere senatores quidem  
 liberique eorum libertinas, et quae ipsae quarumue pater  
 materue artem ludicram fecerit, item corpore quaestum faci-  
 2 entem. Ceteri autem ingenui prohibentur ducere lenam,  
 et a lenone lenaue manumissam, et in adulterio deprehensam,  
 et iudicio publico damnatam, et quae artem ludicram fecerit:  
 adicit Mauricianus<sup>1</sup> et a senatu damnatam.<sup>2</sup>

[XIII. OF THE UNMARRIED MAN, THE CHILDLESS MAN,  
AND HIM WHO HAS BUT ONE CHILD.]

- 1 By the Julian law senators and their children are forbidden  
 to marry their freedwomen, or women who themselves, or  
 whose father or mother, have followed the profession of the  
 2 stage, or women who are common prostitutes. Other  
 persons of free-birth are forbidden to marry a procuress, a  
 freedwoman manumitted by a procurer or procuress, a woman  
 that has been taken in adultery, one that has been convicted  
 in a public criminal prosecution, or one that has been an  
 actress; to these Mauricianus adds one convicted before the  
 senate.

TIT. XIII. *Solitarius pater* has been defined (Abdy and Walker) as a 'father who has lost his children.' But this, which really makes it synonymous with *orbis* in one of its applications, is not the meaning the civilians attach to it. Says Heinecc. (*ad L. Iul. l. ii, c. 15, § 91*): *Pater uero solitarius est qui uel unicum habet filium*. That a single child saved a man from the penalties of *orbitas* appears from a well-known passage in Juvenal (*Sat. ix, 82 f.*), which is confirmed by Gai. in fr. 148, D. *de V. S. (l. 16)*. Heinecc. therefore reconstructs the provision of the *L. Iulia et Papia* thus: *Ex aliorum testamentis pater solitarius solidum capito* ('the father of only one child may take in full under a stranger's testament'). The *caelebs* on the other hand could not take at all, and the *orbis* only a half of what was left him (Gai. ii, §§ 111, 286, 286a).

As will be seen from the text, the only two pars. the epitomist has thought it necessary to retain do not touch the matters indicated in the rubric.

§ 1. The law referred to is the *L. Iulia de maritandis ordinibus*; see Gai. i, 145, note 1. Its words, so far as they deal with the subject-matter of this par., are reproduced by Paul. in fr. 44, pr. D. *de ritu nupt. (xxiii, 2)*. Comp. below, xvi, 2; Vlp. in fr. 43, D. *de ritu nupt. (xxiii, 2)*; Iust. l. 28, C. *de nupt. (v, 4)*.

§ 2. Vahl., making § 1 end with *fecerit*, proposes this transposition: *ceteri autem ingenui prohibentur ducere corpore quaestum facientem, item lenam et a lenone*, etc. M. approves this suggestion.

<sup>1</sup> Iunius Mauricianus, a contemporary of Gaius', was the author of a commentary on the *L. Iulia et Papia Poppaea* (fr. 15, D. *de iureisci, xlix, 14*); and it was probably in the course of it that he made the observation to which Vlp. refers.

<sup>2</sup> From the time of Augustus (or at least Tiberius), and down to that of Diocletian, senators or members of their families, against whom a criminal charge was brought, were entitled to have it disposed of by their peers of the senate; the pro-

## [XIII. DE POENA LEGIS IULIAE.]

Feminis lex Iulia a morte uiri anni tribuit uacationem, a diuortio sex mensum;<sup>1</sup> lex autem Papia a morte uiri biennii, a repudio anni et sex mensum.<sup>1</sup>

## [XV. DE DECIMIS.]

- 1 Vir et uxor inter se matrimonii nomine decimam capere possunt. quod si ex alio matrimonio liberos superstites habeant, praeter decimam quam matrimonii nomine capiunt
- 2 totidem decimas pro numero liberorum accipiunt. Item

## [XIV. OF THE PENALTY OF THE JULIAN LAW.]

The Julian law allowed women exemption from its penalties for a year after their husband's death, and for six months after divorce; the Papian law gives them two years' grace from the death of their husband, and eighteen months' from the date of divorce.

## [XV. OF TENTHS.]

- 1 Husband and wife may take [by testament to the extent of] one-tenth of each other's estate, [simply] on the strength of their marriage; but if either of them have children of a previous marriage surviving, he or she may, in addition to the tenth taken *matrimonii nomine*, take as many more tenths as there
- 2 are children. Further, a son or daughter, issue of the two

cess was not strictly a *publicum iudicium*; but there was no reason why a condemnation in it should not be regarded as arising out of a public prosecution so far as the provisions of the *lex Iulia* were concerned. See Dio. Cass. lii, 21 f.; Dirksen, *Civilistische Abhandlungen*, i, pp. 185 f.; Laboulaye, *Lois criminelles des Romains*, pp. 414 f.

TIT. XIV. The Julian law required women to marry, whether virgins or widows; but in the case of the latter allowed them an interval between the dissolution of one marriage and celebration of the next, during which, although for the moment unmarried, they could take in full under a testament. The legislation of the later empire, however, all tended to discourage second marriages; see tit. C. *de secund. nupt.* (v, 9).

<sup>1</sup> The MS. has *menses*.

TIT. XV, §§ 1, 2. Although these *decimae* are frequently alluded to in vague terms in the Theod. Code, and once or twice in the Dig., yet there is no explicit reference that can be cited as confirmatory of the text. From the words of Constantine, however, in repealing the restriction on testamentary disposition between husband and wife (l. un., § 2, C. *Th. de infirm. poen. caelib.* viii, 16), it seems that it was in apprehension of the consequences of the *fallaces blanditiae* for which marriage gave the opportunity, that Augustus, in the *L. Iulia Papia*, prohibited *mortis causa* liberality between spouses, except under the restrictions indicated in this and the next following title. It led sometimes, as observed by Quint. (*Inst. Orat.* viii, 5, § 19), to this strange result,—that a man could leave more to his mistress than he was allowed to leave to his wife.

communis filius filiaue post nomen diem<sup>1</sup> amissus amissaue unam decimam adicit; duo autem post *nomen diem*<sup>2</sup> 3 amissi duas decimas adiciunt. Praeter decimam etiam usumfructum tertiae partis bonorum *coniuges*<sup>1</sup> capere possunt, et quandoque liberos habuerint, eiusdem partis proprietatem.<sup>2</sup> Hoc amplius mulier praeter decimam dotem [*capere*]<sup>3</sup> potest legatam sibi.<sup>4</sup>

## [XVI. DE SOLIDI CAPACITATE INTER VIRVM ET VXOREM.]

1 Aliquando uir et uxor inter se solidum capere possunt,

spouses, who has died after his name-day, adds another tenth; 3 two dying after their name-days add two-tenths. Besides, either of them may take the usufruct, and if they have children, the ownership-right of a third part of the other's estate. And the wife is entitled, over and above her tenth [or tenths], to take a bequest of her dowry.

## [XVI. OF CAPACITY, AS BETWEEN HUSBAND AND WIFE, TO TAKE IN FULL.]

1 Sometimes husband and wife may take in full what each

<sup>1</sup> See Paul. ex Fest. v. *Lustrici* (ed. Muell. p. 120). The name-day was the ninth for boys and the eighth for girls.

<sup>2</sup> The ms. has *nono die*.

§ 3. Comp. fr. 48, D. *de usur.* (xxii, 1); fr. 10, D. *de praescr. uerb.* (xix, 5). It was a common practice, under this provision of the Papian law, for a husband to make his wife an unconditional bequest of the usufruct of a third of his estate, and a bequest of the property of it conditional on her having children.

<sup>1</sup> So Schill. (*Animadv.*, spec. iii, p. 13); approved by Bk. The ms. has *eius*, which K. thinks a gloss, to be omitted, not corrected. Hu. substitutes [*uir*] *et uxor*.

<sup>2</sup> Comp. fr. 78, § 14, D. *ad SC. Trebell.* (xxxvi, 1); fr. 25, D. *de cond. et dem.* (xxxv, 1).

<sup>3</sup> Added by Bk., on the suggestion of Schill., and adopted by K.; Cuj. amended by changing *potest* into *petet*.

<sup>4</sup> Comp. fr. 53, D. *de legat. II.*

(xxxi); tit. D. *de dote praeleg.* (xxxiii, 4).

TIT. XVI. This is really a continuation of the same subject as in the previous title. But all the rules it contains were abolished in the later empire; comp. tit. C. Th. *de infirm. poen. caelibat.* (viii, 16); tit. C. *de infirm. p. cael.* (viii, 58); l. 27, C. *de nupt.* (v, 4).

The explanation Vlp. gives here of some of the provisions of the *L. Iulia et Papia Poppaea* is not so distinct as one could desire. Unfortunately it does not admit of supplement to any extent from other sources; and, though much has been written on the subject, and notably by Jacques Godefroy (*Ott. Thes.* tom. iii, pp. 203 f.), Ramos del Manzano (*Meerm. Thesaur.* tom. v), and Heinecc. (*ad L. Iul. et Pap. Popp. Comment.*), the matter is really no clearer than Vlp. left it.

§ 1. The words *aut si uir . . . abesse desierit* are removed by Hu. to § 1a, and introduced after *inpetrauerint*.



uelut si uterque uel alteruter eorum nondum eius aetatis sint a qua lex liberos exigit, id est si uir minor annorum xxv sit aut uxor annorum xx minor; item si utrique lege Papia finitos annos in matrimonio excesserint, id est uir LX annos, uxor L;<sup>1</sup> item si cognati inter se coierint usque ad sextum gradum;<sup>2</sup> aut si uir absit,<sup>2</sup> et donec abest et intra annum postquam abesse desierit. Libera inter eos testamenti factio est si ius liberorum a principe inpetrauerint, aut si filium filiamue communem habeant, aut quattuordecim annorum filium uel filiam duodecim amiserint, uel si duos trimos, uel tres post nominum diem amiserint, ut intra annum tamen et sex menses etiam unus cuiuscumque aetatis impubes amissus solidi capiendi ius praestet. item si post mortem uiri intra decem menses uxor ex eo pepererit, solidum ex bonis eius capit.

has left the other, as when both or either of them has not yet reached the age at which the [Papian] law requires issue [as the condition of the *ius capiendi*], i.e. if the husband be under twenty-five or the wife under twenty; as also if, as married persons, they have both survived the ages mentioned in the Papian law as those beyond which its provisions do not apply, i.e. sixty for the husband, fifty for the wife; or if they be related to each other within the sixth degree; while, if the husband be absent from home, [he is exempt from the penalties of the statute] both during his absence and for a year after his return. Husband and wife are further quite free to take under each other's testaments if they have obtained a concession from the emperor of the privilege resulting from children; or if they have a surviving son or daughter of their marriage, or have lost a son of fourteen or a daughter of twelve; or if they have lost two children over three years of age, or three that survived their name-days: and the death of any of those impubes within eighteen months [after the dissolution of the marriage] secures for them the right of taking in full [exactly as if it had occurred before the marriage was dissolved]. Further, if the wife give birth to a child by her husband within ten months of his death, she is equally entitled to take in full anything he may have left her.

<sup>1</sup> Comp. § 3.

<sup>2</sup> Cuj. and many later eds., with some show of reason, interpolate *reipublicae causa*, thus limiting the exemption to persons absent from home on the public service,

and so prevented from complying with the provisions of the statute.

§ 1a. The *testamenti factio* here referred to is that which the civilians call *passiua*; see Gai. ii, 114, note 1.

- 2 Aliquando nihil inter se capiunt, id est si contra legem Iuliam Papiamque Poppaeam contraxerint matrimonium, uerbi gratia si famosam quis uxorem duxerit aut libertinam senator.
- 3 Qui intra sexagesimum uel quae intra quinquagesimum annum neutri legi paruerit, licet ipsis legibus post hanc aetatem liberatus esset, perpetuis tamen poenis tenebitur ex
- 4 senatusconsulto Perniciano. sed Claudiano senatusconsulto<sup>1</sup> maior sexagenario si minorem quinquagenaria duxerit perinde habebitur ac si minor sexaginta annorum duxisset uxorem. quod si maior quinquagenaria minori sexagenario nupserit, inpar matrimonium appellatur, et senatusconsulto Caluitiano<sup>2</sup> iubetur non proficere ad capiendas hereditates et *legata* [*et*] *dotes*.<sup>3</sup> itaque mortua muliere dos caduca erit.

2 Sometimes they take nothing from each other, namely when they have contracted marriage in contravention of the Julian and Papia-Poppaeian law, as, for example, when any man [of free-birth] has married a woman of infamous character, or a senator a freedwoman.

3 A man who has failed to comply with the requirements of either branch of the statute within his sixtieth year, and a woman who has failed to do so within her fiftieth, are after that age exempt from its provisions [so far as the statute itself is concerned]; yet by the Pernician senatusconsult they are

4 liable permanently to the penalties [of celibacy]. But by a Claudian senatusconsult a man over sixty marrying a woman under fifty is to be regarded as if he had married before reaching sixty; if, however, a woman over fifty marry a man under sixty, the marriage is styled unequal, and is declared by the Calvitian senatusconsult to be of no avail as a qualification for taking either an inheritance, a legacy, or a dowry. On the wife's death, therefore, her dowry will be caducous.

§ 2. See tit. xiii, and refs.

§ 3. The *SC. Pernicianum* is not mentioned elsewhere. Perizonius thinks it should be *Persicianum*, attributing it to P. Fab. Persicus, consul 787 | 34. This is probably right, as Sueton. (*in Claud.* § 23), referring to the Claudian Sct. mentioned in next par., says it was corrective of an enactment of the reign of Tiberius.

§ 4. I have followed Hu. in making this par. begin at *sed Claudiano*. Most eds. make it commence at

*quod si maior.*

<sup>1</sup> See note to last par.

<sup>2</sup> Augustinus, Perizonius, Schulting, and others, alter the name of the Sct. to *Caluisianum*; Haenel (*Corp. Leg.* p. 54) attributes it to Nero, and year 61.

<sup>3</sup> The ms. has *legata dotes*, and many of the earlier editions *legatas dotes*. The correction in the text was suggested by Cuj., and has been adopted by Hugo, Bk., and K.; Gneist and Vahl. have *legata dotes*.

## [XVII. DE CADUCIS.]

- 1 Quod quis sibi testamento relictum, ita ut iure civili capere possit, aliqua ex causa non ceperit, caducum appellatur, ueluti ceciderit ab eo: uerbi gratia si caelibis uel latino Iuniano legatum fuerit, nec intra dies centum uel caelebs legi paruerit uel latinus ius Quiritium consecutus sit; aut si ex parte heres scriptus uel legatarius ante apertas tabulas decesserit uel
- 2 peregrin<sup>1</sup> factus sit. Hodie ex constitutione imperatoris Antonini omnia caduca fisco uindicantur; sed seruato iure

## [XVII. OF CADUCOUS TESTAMENTARY GIFTS.]

- 1 A testamentary gift which, for some reason or other, he to whom it was left has failed to take, although so left that according to the rules of the *ius civile* he might have taken it, is called caducous, as if it had fallen from his grasp, *ceciderit ab eo*; for instance, if a legacy have been left to a celibate or Junian latin, but the celibate has failed within a hundred days to comply with the statute, or the latin to acquire citizenship; or if an heir instituted to a share of the inheritance, or a legatee, have died or become a peregrin before the opening
- 2 of the will. At the present day, by a constitution of the emperor Antonine's, all such lapses are claimed for the fisc; the rule of the old law, however, being retained in favour of

que, and Hu. *legata aut dotem*. The difficulty is to reconcile the idea of *dos caduca* with the definition of *caducum* in next title. We have the phrase, however, in fr. 38, § 1, fr. 61, D. *de ritu nupt.* (xxiii, 2), and again in l. 8b, C. *de nupt.* (v, 4). The statement seems to refer to the *dos aduenticia*. According to the general rule (above, vi, 5), *semper penes maritum remanet* on his wife's death; but if the marriage, though not null, was yet a forbidden one, the surviving husband had to pay it over (under deduction of *impensae*, fr. 61, D. *de ritu nupt.*) to the fisc as caducous.

TIT. XVII, § 1. Comp. xxviii, 7; xix, 17; xxii, §§ 2, 3; Gai. ii, §§ 111, 144, 150, 286; Iust. in l. 1, C. *de caduc. toll.* (vi, 51).

<sup>1</sup> So in the ms.; Cuj. and many eds. have *peregrinus*.

§ 2. It is Caracalla that is here re-

ferred to; and Haenel (*Corp. Leg.* p. 152) assigns his enactment to the year 212.

M., Bk., Vahl., and Hu. are of opinion that the copyist has taken this par. from the margin of the original, and wrongly introduced it here instead of before the sentence that stands as tit. xviii.

Hu. is further of opinion that it must have been preceded by such words as these, explanatory of the *ius antiquum*: *Caduca iure antiquo quidem ad coheredes uel collegatarios pertinebant iure ad crescendi, aut legata in hereditate remanebant. Et lege Papia autem translata sunt ad heredes patres uel legatarios patres, certo ordine in caducis uindicandis constituto, ut si heres uel legatarius pater non esset uel non uindicaret, caducum ad populum deferretur. Et eiusdem bona esse iubentur si nemo defuncto heres factus sit.*

X See note post 438.

- 3 antiquo liberis et parentibus. Caduca cum suo onere fiunt : ideoque libertates et legata [*et*] fideicommissa ab eo data, ex cuius persona hereditas caduca facta est, salua sunt: *sed et*<sup>1</sup> legata et fideicommissa cum suo onere fiunt caduca.

[XVIII. QVI HABEANT IVS ANTIQVVM IN CADVCIS.]

Item liberis et parentibus testatoris usque ad tertium gradum lex Papia ius antiquum dedit, ut heredibus illis institutis, quod quis ex eo testamento non capit, ad hos pertineat aut totum aut ex parte, prout pertinere possit.

[XVIII. DE DOMINIIS ET ADQVISATIONIBVS RERVVM.]

- 1 Omnes res aut *mancipi*<sup>1</sup> sunt aut nec *mancipi*. *mancipi* res sunt *praedia* in Italico solo,<sup>2</sup> *tam* rustica,<sup>3</sup> qualis est fundus, quam urbana, qualis domus; item iura *praediorum*

- 3 descendants and ascendants [of the testator]. When a gift becomes caducous it does so with its burdens; therefore gifts of freedom, legacies, and trust-bequests charged upon him in whose person an inheritance has become caducous, are still effectual. And when legacies or trust-gifts [themselves] become caducous, they also are still subject to their burdens.

[XVIII. WHO ARE UNDER THE RULES OF THE OLD LAW IN CASES OF LAPSE.]

The Papian law granted [the benefit of] the ancient law to descendants and ascendants of the testator as far as the third degree; so that if they had been instituted heirs, and any one failed to take under the testament, what thus lapsed was to belong to them in whole or in part as the case might be.

[XIX. OF OWNERSHIPS AND OF THE MODES OF ACQUIRING THINGS.]

- 1 Things are all either *mancipi* or *nec mancipi*. *Res mancipi* include *praedia* in places of Italic right, both rural, as a field, and urban, as a house; also rights belonging to rural *praedia*,

§ 3. Comp. i, 21. Vahl. puts this par. before § 2.

<sup>1</sup> So Cuj., and much more appropriate than the *scilicet* of the MS., retained by Bk., Vahl., and K.

TIT. XVIII. See note to XVII, 2. Comp.

'3 to 1. 21

1. 1, pr. C. *de caduc. toll.* (vi, 51).

TIT. XIX, § 1. Comp. Gai. ii, §§ 15-17.

<sup>1</sup> In most cases spelt *mancepi* in the MS.

<sup>2</sup> Comp. Gai. i, 120, note 2.

<sup>3</sup> The MS. has *solo aut rustico*.



rusticorum, uelut uia iter actus<sup>4</sup> aquaeductus; item serui et quadrupedes quae dorso collouae domantur, uelut boues muli equi asini. ceterae res nec Mancipi sunt. elephanti et cameli, quamuis collo dorsouae domentur, nec Mancipi sunt, quoniam bestiarum numero sunt.

2 Singularum rerum dominium<sup>1</sup> nobis acquiritur Mancipatione, traditione, in iure cessione, usucapione, adiudicatione, lege.

3 Mancipatio propria species alienationis est rerum Mancipi; eaque fit certis uerbis, libripende et quinque testibus praesentibus.<sup>1</sup> Mancipatio locum habet inter ciues Romanos et latinos coloniarios latinosque Iunianos eosque peregrinos  
5 quibus commercium datum est. Commercium est emendi

such as rights of way in the forms of *uia*, *iter*, and *actus*, and right of aqueduct; as also slaves, and animals that are tamed by yoke or saddle, such as oxen, mules, horses, asses. All other things are *nec Mancipi*. Elephants and camels, though tamed by yoke and saddle, are *nec Mancipi*, being classed amongst wild beasts.

2 We acquire the ownership of things singly by Mancipation, by tradition, by cession in court, by usucapion, by adjudication, or by statute.

3 Mancipation is a mode of alienation peculiar to *res Mancipi*, and is performed by recital of certain words of style, in  
4 presence of a balance-holder and five witnesses. It is competent between Roman citizens and colonial and Junian latins, and such peregrins as have had a concession of *commercium*.

5 *Commercium* is the capacity for reciprocally acquiring and

<sup>4</sup> Comp. pr. I. *de seruitut.* (ii, 3).  
§ 2. Comp. Varro, *de R. R.* ii, 10, § 4 (Bruns, p. 283); Gai. ii, 65. *Mancipatio* is dealt with in §§ 3-6, Gai. ii, §§ 22-37; *traditio*, § 7, Gai. ii, §§ 19-21; *in iure cessio*, §§ 9-15, Gai. ii, §§ 22-37; *usucapio*, § 8, Gai. ii, §§ 40-60; *adiudicatio*, § 16, Gai. iv, 42; *lex*, § 17.

<sup>1</sup> The ms. has *dominia* both here and in §§ 7, 8, and 16; in all of these, following the example of Bk., Hu., and K., I have substituted the singular.

§ 3. Comp. Gai. i, 119; ii, 22.

<sup>1</sup> The ms. has *testes praesentes*.

§ 4. Comp. Gai. ii, 22. On the *latini coloniarii*, see Gai. i, 22, and notes; iii, 56: on the *latini Iuniani*, above, i, §§ 12-16.

§ 5. Comp. Th. iii, 19, § 2. Just as *conubium* (v, 3, and note) was the technical expression for capacity to contract a marriage of the *ius civile* and to participate in all its consequences, so was *commercium* the capacity to acquire or alienate estate according to the forms of the *ius civile*, and to participate in the advantages or disadvantages resulting therefrom; as the former was the qualification for participating in the family relations of the *ius civile*, so was *commercium* the qualification for participating in its patrimonial relations.

To speak of *commercium* as the right to buy and sell, i.e. to be a party to the *iuris gentium* contract of *emptio uenditio*, would be decep-

- 6 uendendique inuicem ius. Res mobiles non nisi praesentes mancipari possunt, et non plures quam quot manu capi possunt; immobiles autem etiam plures simul, et quae diuersis locis sunt, mancipari possunt.
- 7 Traditio propria est alienatio rerum nec Mancipi. harum rerum dominium ipsa traditione adprehendimus, scilicet si ex iusta causa traditae sunt nobis.
- 8 Vsucapione dominium adipiscimur tam Mancipi rerum quam nec Mancipi. usucapio est autem domini adeptio per continuationem possessionis anni uel biennii: rerum mobilium anni, immobilium biennii.
- 9 In iure cessio quoque communis alienatio est et Mancipi rerum et nec Mancipi: quae fit per tres personas, in iure

6 alienating [according to the forms of the *ius civile*]. Moveables cannot be mancipated except in the presence of the parties, and not more at a time than can be taken by the hand [of the mancipree]; but immoveables can be mancipated several at once, and though situate in different localities.

7 Tradition is a mode of alienation appropriate to *res nec Mancipi*. And simply by tradition we acquire the ownership of such things, provided always it proceed upon a title sufficient in law.

8 By usucapion we acquire the ownership as well of *res Mancipi* as of *res nec Mancipi*. And usucapion is acquisition of ownership by continuance of possession for one or two years,—one in the case of moveables, two in that of immoveables.

9 Cession in court also is a mode of alienation common both to *res Mancipi* and *res nec Mancipi*; and is accomplished by

tive in the extreme; the word is older by centuries than the contract. As mentioned in Gai. i, 113, note 2, and ii, 104, note 6, *emere* in the old law meant simply to take, receive, or acquire, without reference to a price; as Pompon. says, on the authority of Aristo, in fr. 29, § 1, D. *de statulib.* (xl, 7), *lex duodecim tabularum emtionis uerbo omnem alienationem complexa uideretur*. Therefore, to have the *commercium* or *ius emendi uendendique* in the sense of the XII Tables, was to be capable of acquiring or alienating according to any of the forms of the *ius civile* that did not necessarily imply *conubium*.

Like *conubium*, the word *commercium* had its abstract, concrete, and relative meanings. In the abstract it was a prerogative of every citizen and afterwards of every Junian latin; but in the concrete it was denied to the interdicted spendthrift (above, xii, 3; Paul. iii, 4a, § 7). Relatively a citizen had it with his fellow-citizens and with Junian latins; but not with peregrins, unless the latter enjoyed it by special grant (§ 4).

§ 6. Comp. Gai. i, 121.

§ 7. Comp. Gai. ii, §§ 19, 20, 65.

§ 8. Comp. Gai. ii, §§ 42-44.

§§ 9, 10. Comp. Gai. ii, §§ 22, 24.

- 10 cedentis, uindicantis, addicentis.<sup>1</sup> In iure cedit dominus;  
 11 uindicat is cui ceditur; addicit<sup>1</sup> praetor. In iure cedi res  
 etiam incorporales possunt, uelut ususfructus et hereditas et  
 12 tutela legitima libertae. Hereditas in iure ceditur uel  
 13 antequam adeatur uel posteaquam adita fuerit. Antequam  
 adeatur, in iure cedi potest *ab herede legitimo*;<sup>1</sup> posteaquam  
 adita est, tam a legitimo quam ab eo qui testamento heres  
 14 scriptus est. Si antequam adeatur hereditas in iure cessa  
 sit, proinde heres fit cui cessa est ac si ipse heres legitimus  
 15 esset. Quod si *posteaquam*<sup>2</sup> adita fuerit in iure cessa sit, is  
 qui cessit permanet heres, et ob id creditoribus defuncti manet  
 obligatus; debita uero pereunt, id est debitores defuncti libe-  
 rantur: res autem corporales, *quasi* singulae in iure *cessae*  
*essent*,<sup>3</sup> transeunt ad eum cui cessa est hereditas.
- 16 Adiudicatione dominium nanciscimur per formulam<sup>1</sup>

[co-operation of] three persons,—the cedent, the vindicant,  
 10 and the addicent. It is the owner that cedes; he to whom  
 11 the thing is ceded vindicates; the praetor addicts. Even  
 incorporeals can be ceded in court, as for instance a usufruct,  
 12 an inheritance, or the tutory-at-law of a freedwoman. An  
 13 inheritance is ceded either before or after entry. Before  
 entry it may be ceded by the heir-at-law; after it, not only  
 by an heir-at-law but also by an heir instituted by testament.  
 14 If the cession have been before entry, the cessionary at once  
 15 becomes heir, as if he himself were heir-at-law. If the  
 cession be after entry, the cedent still remains heir, and con-  
 sequently is responsible to the creditors of the deceased; but  
 his claims are extinguished, *i.e.* the deceased's debtors are  
 discharged. The corporeals that belonged to him, however,  
 pass to the cessionary of the inheritance as if they had been  
 ceded to him one by one.

16 We acquire ownership by adjudication in the action for

<sup>1</sup> I am unwillingly obliged to coin a word for the translation. Adju- cant and adjudicate would popu- larly express the idea, but might generate a serious misapprehension. *Addictio* and *adiudicatio* were two very different acts: the first was magisterial, the second judicial; the one that of a praetor, the other that of a *iudex* (comp. § 10 with § 16).

§ 11. Comp. Gai. i, §§ 168-171; ii, §§ 14, 29-38; above, xi, §§ 6-8.  
 §§ 12-15. Comp. Gai. ii, §§ 34-37; iii, §§ 85-87.

<sup>1</sup> The ms. has *legitimo* 'ab herede'; hence in the earlier editions *legitime ab herede*, and in those of last cen- tury a *legitimo herede*. The version in the text is that of Bk., Vahl., Hu., and K.

<sup>2</sup> The ms. has *posteaquam*.

<sup>3</sup> The words *quasi . . . cessae essent* are adopted by all recent eds. on the strength of Gai. ii, 35; the ms. has *quoties . . . cesse sunt*.

§ 16. Comp. Gai. iv, 42; § 20, I. *de act.* (iv, 6); §§ 4-7, I. *de off. iud.* (iv, 17).

<sup>1</sup> The *formula* was the record or

familiae ereiscundae, quae locum habet inter *coheredes*,<sup>2</sup> et per formulam communi diuidundo, cui locus est inter socios, et per formulam finium regundorum, quae est inter uicinos. nam si iudex uni ex heredibus aut sociis aut uicinis rem aliquam adiudicauerit, statim illi acquiritur, siue *mancipi* siue *nec mancipi* sit.

17 Lege nobis acquiritur uelut caducum<sup>1</sup> uel *ereptorium*<sup>2</sup> ex lege Papia Poppaea, item legatum<sup>3</sup> ex lege duodecim tabularum, siue *mancipi* res sint siue *nec mancipi*.

18 Adquiritur autem nobis etiam per eas personas, quas in potestate manu<sup>1</sup> *mancipio*ue habemus. itaque *si quid*<sup>2</sup> *mancipio* puta acceperint, aut traditum eis sit, uel stipulati

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partitioning an inheritance, employed by co-heirs; in that for dividing common property, competent between partners; and in that for settling boundaries, employed between neighbours. For if the judge have adjudicated any particular thing to one of the heirs, partners, or neighbours, it instantly becomes his, whether it be *mancipi* or *nec mancipi*.

17 We acquire by operation of statute in the case of lapsed and forfeited testamentary gifts under the provisions of the Papia-Poppaeian law, and in that of a legacy under the law of the Twelve Tables, whether the thing acquired be *res mancipi* or *nec mancipi*.

18 We acquire [not only by our own instrumentality but] also by means of those persons whom we have in our *potestas*, *manus*, or *mancipium*; if therefore they have received anything by mancipation, or have had a thing delivered to them, or have stipulated for something, the thing [or the claim]

issue sent by the praetor to a *iudex* for trial (Gai. iv, §§ 39-43), and is here used synonymously with *actio* or *iudicium*.

<sup>2</sup> The ms. has *inter quos heredes*.

§ 17. Comp. fr. 130, D. *de V. S.* (l. 16). Usucapion might quite as well have been styled a mode of acquisition *ex lege* as any of the three enumerated in this par., seeing that like them it rested on statutory authority.

<sup>1</sup> Comp. above, tit. xvii.

<sup>2</sup> The ms. has *erupturium*, and the early editions *ereptitium*. The word does not occur elsewhere in the texts; but it referred to successions or bequests which, having been

actually reduced into possession by the heirs, legatees, or trust-beneficiaries, were afterwards taken from them at the instance of the fisc, because of some wrong done or disrespect shown by them to the deceased or his family, some act done contrary to the instructions of his testament, or the discovery of some informal deed revoking his liberality. Comp. Paul. iii, 5, §§ 10, 13; tit. D. *de his quae ut indignis auferuntur* (xxxiv, 9); tit. C. *de his quib. ut indign.* (vi, 35).

<sup>3</sup> Comp. xi, 14; Gai. ii, 97.

§§ 18, 19. Comp. Gai. ii, §§ 86-90.

<sup>1</sup> See note to tit. ix.

<sup>2</sup> The ms. has *siquidem*.



19 fuerint, ad nos pertinet. Item si heredes instituti sint  
 legatumue eis sit, et hereditatem iussu nostro adeuntes nobis  
 20 adquirunt et legatum ad nos pertinet. Si seruus alterius  
 in bonis, alterius ex iure Quiritium sit, ex omnibus causis  
 21 adquirat ei cuius in bonis est. Is quem bona fide possi-  
 demus, siue liber siue alienus seruus sit, nobis adquirat ex  
 duabus causis tantum, id est quod ex re nostra et quod ex  
*operis*<sup>1</sup> suis adquirat: extra has autem causas aut sibi adquirat  
 si liber sit, aut domino si alienus seruus sit. eadem sunt et  
 in eo seruo in quo tantum usumfructum habemus.

## [XX. DE TESTAMENTIS.]

1 Testamentum est mentis nostrae iusta contestatio, in id  
 2 sollemniter factum ut post mortem nostram ualeat. Testa-  
 mentorum genera fuerunt tria, unum quod *calatis comitiis*,  
 alterum quod in *procinctu*, tertium quod per aes et libram  
 appellatum est. his<sup>1</sup> duobus testamentis abolis hodie solum

19 belongs to us. So also if they have been instituted heirs,  
 or if a legacy has been left them, they acquire the inheritance  
 for us by entry on our instructions, and the legacy belongs to  
 20 us. If a slave be *in bonis* of one man, but belong to another  
*ex iure Quiritium*, it is in every case for his bonitarian owner  
 21 that he acquires. An individual whom we possess in good  
 faith, whether he be a freeman or another person's slave,  
 acquires for us in two cases only,—namely, what he has made  
 with means we have provided, or by his own labour. Outside  
 those two cases he acquires for himself if he be a freeman, for  
 his owner if he be the slave of a third party. And the  
 same rules apply to a slave of whom we have only a usufruct.

## [XX. OF TESTAMENTS.]

1 A testament is the testification of our will, in the form pre-  
 scribed by law, made solemnly, on purpose that it may be  
 2 effectual after our death. There used to be three kinds of  
 testament,—one called a testament *calatis comitiis*, another *in*  
*procinctu*, and the third *per aes et libram*. The two first having  
 become obsolete, the only one now in use is that executed by

§ 20. Comp. i, 16; Gai. ii, 88.

§ 21. Comp. Gai. ii, §§ 91, 92; iii, §§ 164-166.

<sup>1</sup> The ms. has *operibus*.

*test.* (ii, 10).

§ 2. Comp. Gai. ii, 101-104, and notes.

<sup>1</sup> So the ms., Bk., Vahl., and K.; most other eds. have *illis*, which is more accurate.

TIT. XX, § 1. Comp. § 9; pr. I. de

in usu est quod per aes et libram fit, id est per mancipationem imaginariam. in quo testamento libripens adhibetur, et familiae emptor, et non minus quam quinque testes cum  
3 quibus testamenti factio est. Qui in potestate testatoris est aut familiae emptoris, testis aut libripens adhiberi non potest, quoniam familiae mancipatio inter testatorem et familiae emptorem fit, et ob id domestici testes adhibendi non sunt.  
4 Filio *familiam emente*<sup>1</sup> pater eius testis esse non potest.  
5 Ex duobus fratribus, qui in eiusdem patris potestate sunt, alter familiae emptor alter testis esse non potest, quoniam quod unus ex his mancipio accipit acquirit patri, cui filius  
6 suus testis esse non debet. Pater et [*filius*] qui in potestate eius est, *item*<sup>1</sup> duo fratres qui in eiusdem patris potestate sunt, testes utrique, uel alter testis alter libripens fieri possunt, alio *familiam emente*; quoniam nihil nocet ex una domo  
7 plures testes alieno negotio adhiberi. Mutus, surdus, furiosus, pupillus, femina neque familiae emptor esse neque

the copper and the scales, *i.e.* by an imaginary mancipation. In this testament a balance-holder takes a part, and a *familiae emptor*, and not fewer than five witnesses with whom the  
3 testator has *testamenti factio*. He who is *in potestate* of the testator or of the *familiae emptor* cannot officiate as balance-holder or as a witness; for the testator and the *familiae emptor* are the parties to the mancipation, and on that account  
4 the testimony of members of their families is excluded. If a son be *familiae emptor* his father cannot be a witness.  
5 Of two brothers who are in the *potestas* of the same father, one cannot be *familiae emptor* and the other a witness; for what the former acquires by the mancipation is acquired by him for his father; and a son ought not to be a witness to his  
6 father's deed. A father and his son *in potestate*, or two brothers in the *potestas* of the same father, may both be witnesses, or one of them a witness and the other the balance-holder, where a third party is *familiae emptor*; for there is no harm in getting more than one person from the same house-  
7 hold to act as witnesses of a stranger's deed. A dumb or deaf person, a madman, a pupil, or a woman, can neither be *familiae emptor* nor be employed as a witness or as balance-

§ 3. Comp. Gai. ii, §§ 105, 107.  
§§ 4, 5. Comp. Gai. ii, 106.  
<sup>1</sup> The ms. has *familiae mente*; hence many eds. *filiofamiliae emente*.  
§ 6. Reproduced in fr. 17, D. *de testibus* (xxii, 5), from which the word  
§ 7. Comp. § 6, I. *de testam.* (ii, 10),  
*filius*, omitted in the text, is borrowed. Comp. § 8, I. *de testam.* (ii, 10).  
<sup>1</sup> So in the fr. Dig. and par. Inst. referred to; *institutus* in the ms.

- 8 testis libripensue fieri potest. Latinus Iunianus et familiae emptor et testis et libripens fieri potest, quoniam cum eo testamenti factio est.
- 9 In testamento quod per aes et libram fit duae res aguntur, familiae mancipatio et nuncupatio testamenti. nuncupatur testamentum in hunc modum: tabulas testamenti testator tenens ita dicit: HAEC VT IN HIS TABVLIS CERISVE<sup>1</sup> SCRIPTA SVNT ITA DO, ITA LEGO, ITA TESTOR; ITAQVE VOS, QVIRITES, TESTIMONIVM PERHIBETOTE.<sup>2</sup> quae nuncupatio et testatio<sup>3</sup> uocatur.
- 10 Filius familiae testamentum facere non potest, quoniam nihil suum habet ut testari de eo possit. sed diuus Augustus *militibus concessit*<sup>1</sup> ut filius familiae miles de eo peculio quod
- 11 in castris adquisiuit testamentum facere possit. Qui de statu suo incertus est, *fac eo*<sup>1</sup> quod patre peregre mortuo

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8 holder. A Junian latin may be employed either as *familiae emptor*, witness, or balance-holder; for with him there is *testamenti factio*.

9 In a testament by the copper and the scales there are two separate acts,—the mancipation of the *familia* [or estate], and the nuncupation of the testament. The nuncupation proceeds thus: the testator, holding his testamentary tablets, speaks as follows: ‘As is written in these waxen tablets, so do I give, so do I legate, so do I declare my will; therefore, Quirites, grant me your testimony.’ This nuncupation is also called *testatio*.

- 10 A *filiusfamilias* cannot make a testament; for he has nothing of his own about which to declare his will. But the emperor Augustus *made this concession to the military profession*,—that a *filiusfamilias*, being a soldier, might make a testament disposing of the *peculium* he had acquired on
- 11 service. He who is in uncertainty as to his *status*, as when he is ignorant that he has become *sui iuris* through his father’s

§ 8. Comp. xi, 16; xx, 14; xxii, 3; Gai. ii, 114, note 1.

§ 9. Comp. Gai. ii, 104, and notes.

<sup>1</sup> Gai. has *cerisque*; so has Isidor.

*Orig.* v, 24, § 12.

<sup>2</sup> *Pbitote* in the ms., whence most eds. *praebitote*.

<sup>3</sup> Comp. pr. I. *de test.* (ii, 10).

§ 10. Comp. Paul. iii, 4a, § 3; pr. I. *quib. non est perm. test. fac.* (ii, 12).

<sup>1</sup> This is a suggestion of Boecking’s, and finds some justification in

pr. I. *quib. non est perm. test. fac.* (ii, 12). The ms. has *Augustus Marcus constituit*. It has been proposed to substitute *Magnus* or *primus* for *Marcus*; Hu. replaces it with *moribus*; and K., following Cuj., deals with it as an incautious gloss. So does Bk. in his text. I prefer the suggestion in his notes.

§ 11. Comp. fr. 14, fr. 15, D. *qui test. fac. poss.* (xxviii, 1).

<sup>1</sup> So Hu., improving on Heim-

- ignorat se sui iuris esse, testamentum facere non potest.
- 12 Inpubes, licet sui iuris sit, facere testamentum non potest,
- 13 quoniam nondum plenum iudicium animi habet. Mutus, surdus, furiosus, itemque prodigus cui lege bonis interdictum est, testamentum facere non possunt: mutus, quoniam uerba nuncupationis loqui non potest; surdus, quoniam uerba familiae emptoris exaudire non potest; furiosus, quoniam mentem non habet ut testari de *sua re*<sup>1</sup> possit; prodigus, quoniam commercio<sup>2</sup> illi interdictum est<sup>3</sup> et ob id familiam
- 14 mancipare non potest.<sup>2</sup> Latinus Iunianus, item is qui dediticiorum numero est, testamentum facere non potest: latinus quidem quoniam nominatim lege Iunia prohibitus est; is autem qui dediticiorum numero est, quoniam nec quasi ciuis Romanus testari potest, cum sit peregrinus, nec quasi

- 12 death abroad, cannot make a testament. A person under puberty, though he may be *sui iuris*, cannot make a testament,
- 13 for his judgment is still defective. Neither a person who cannot speak, nor one who cannot hear, nor a madman, nor a spendthrift to whom the law has interdicted the management of his property, can make a testament: a mute, because he cannot utter the words of nuncupation; a deaf person, because he cannot hear the words of the *familiae emptor*; a madman, because he has no rational will to enable him to declare it in reference to his estate; a spendthrift, because he is denied the *commercium*, and so is unable to mancipate his *familia*.
- 14 Neither a Junian latin nor a freedman numbered amongst the dediticians can make a testament: a latin, because he is expressly forbidden by the Junian law; a deditician freedman, because he can neither test as a Roman citizen, seeing he is a peregrin, nor as a peregrin, seeing he is not a citizen of any

bach's *fac ideo*; the ms. has *facto*; Bk., Vahl., and K., *factus*. The illustration does not seem a very happy one, as, except he were a soldier, a man would not be likely to make a testament unless he believed himself *sui iuris*; while if he was a soldier, making a military testament, it did not matter in the least whether he was *sui* or *alieni iuris*.

§ 12. Comp. Gai. ii, § 113.

§ 13. Comp. Paul. iii, 4a, §§ 5, 11, 12; §§ 2, 3, I. *quib. non est perm.* (ii, 12)

<sup>1</sup> So Hugo and Kr. The ms. has *de ea re*, which Bk. and Hu. retain, the former explaining that he understands it to mean *cum effectu*. But this, as well as the *de ea recte* of Cann., amounts to *testatio mentis* (§ 1) *de mente*, which is a questionable locution.

<sup>2</sup> See xix, 5, note.

<sup>3</sup> See the formula of interdiction in Paul. iii, 4a, § 7. See also xii, 3.

§ 14. Comp. i, §§ 10, 11; xi, 16; xvii, 1; xxii, §§ 2, 3; Gai. i, §§ 13, 22-25; iii, 74.



peregrinus, quoniam nullius certae ciuitatis *ciuis est*,<sup>1</sup> ut  
 15 *secundum*<sup>2</sup> leges ciuitatis suae testetur. Feminae post  
 duodecimum annum aetatis testamenta facere possunt tutore  
 16 auctore, donec in tutela sunt. Seruus publicus *populi*  
*Romani*<sup>1</sup> partis dimidiaei testamenti faciendi habet ius.

## [XXI. QVEMADMODVM HERES INSTITVI DEBEAT.]

Heres institui recte potest his uerbis: TITIVS HERES ESTO,  
 TITIVS HERES SIT, TITIVM HEREDEM ESSE IVBEO; illa autem  
 institutio: HEREDEM INSTITVO, HEREDEM FACIO, plerisque impro-  
 bata est.

## [XXII. QVI HEREDES INSTITVI POSSVNT.]

1 Heredes institui possunt qui testamenti factionem cum

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particular [peregrin] state, so as to be able to test according to  
 15 the laws of his own country. Women can make testaments  
 after their twelfth year, [but only] with *auctoritas* of their  
 16 tutors so long as they are in tutelage. A public slave of  
 the Roman people has the right to make a testament of one  
 half [of his *peculium*].

## [XXI. HOW AN HEIR OUGHT TO BE INSTITUTED.]

An heir can be properly instituted by these words: 'Titius  
 be heir,' or 'Let Titius be heir,' or 'I order that Titius shall  
 be heir.' But such an institution as 'I institute [Titius] as  
 heir,' or 'I make [Titius] my heir,' is generally disapproved.

## [XXII. WHO CAN BE INSTITUTED HEIRS.]

1 Those can be instituted as heirs who have *testamenti factio*

<sup>1</sup> So Cuj. and all subsequent eds.;  
 the ms. has *sciens*.

<sup>2</sup> The ms. has *aduersus*, — a  
 mistake which occurs again in  
 xxviii, 1.

§ 15. Comp. Gai. ii, §§ 113, 118.

§ 16. This statement is not supported  
 elsewhere. Pomp. in fr. 16, pr.,  
 Modest. in fr. 19, and Vlp. himself  
 in fr. 20, § 7, D. *qui test. fac. poss.*  
 (xxviii, 1), all deny that a slave  
 could make a testament. Owners,  
 however, sometimes allowed their  
 slaves to make '*quasi testamenta*,'  
 disposing of their *peculia* amongst

their comrades,—*intra domum*; see  
 Plin. Epist. viii, 16.

<sup>1</sup> Here, as in xxiv, 28, the ms.  
 has *praetoriani*.

TIT. XXI. Comp. Gai. ii, 117, and  
 note; Vlp. in fr. 1, §§ 3-7, D. *de*  
*heredib. instit.* (xxviii, 5); Const. in  
 l. 15, C. *de testam.* (vi, 23).

TIT. XXII, § 1. Comp. § 24, I. *de legat.*  
 (ii, 20); fr. 16, D. *qui test. fac.*  
*poss.* (xxviii, 1). On meaning of  
*testamenti factio*, see Gai. ii, 114,  
 note 1.

2 testatore habent.      Dediticiorum numero heres institui non potest, quia peregrinus est, cum quo testamenti factio non est.

3 [*Latinum Iunianum heredem instituere omnino licet, et*]<sup>1</sup> si quidem mortis testatoris tempore uel intra diem cretioni<sup>2</sup> ciuis Romanus sit, heres esse potest; quodsi latinus manserit, lege Iunia capere hereditatem prohibetur. idem iuris est in

4 persona caelibis propter legem Iuliam.<sup>3</sup>      Incerta persona heres institui non potest, uelut hoc modo: QVISQVIS PRIMVS AD FVNVS MEVM VENERIT HERES ESTO; quoniam certum con-

5 silium debet esse testantis.      Nec municipia nec municipes heredes institui possunt, quoniam incertum corpus est, et neque cernere uniuersi neque pro herede *gerere*<sup>1</sup> possunt ut heredes fiant: senatusconsulto tamen concessum est ut a libertis suis heredes institui possint. Sed fideicommissa hereditas municipibus restitui potest; denique hoc senatus-

2 with the testator.      An individual numbered amongst the dediticians cannot be instituted heir, for he is a peregrin, and

3 with him there is no *testamenti factio*.      *A Junian latin may at any time be instituted as heir, and if, at the date of the testator's death, or before the time for cretione has expired, he be a Roman citizen, he can actually become heir; but if he have remained a latin he is forbidden by the Junian law to take the inheritance. The rule is the same in the case of an*

4 unmarried person by reason of the Julian law.      An uncertain person cannot be instituted heir, for example thus: 'Whoever shall come first to my funeral, let him be my heir;' for the intention of a testator ought to be definite.

5 Neither a municipality nor its members can be instituted heirs, for the body is uncertain, and neither can they cern collectively, nor collectively behave as heirs, so as to become heirs; but a senatusconsult allows them to be instituted by their freedmen. An inheritance left to them in a trust-deed, however, may be made over to the members of a municipal corporation; in fact this is provided by the same senatus-

§ 2.    Comp. Gai. i, 125; ii, §§ 110, 218.

§ 3.    Comp. Gai. i, §§ 23, 24; ii, 275; below, § 8; above, xvii, 1; xx, 14.

<sup>1</sup> Added by M. Bk., Vahl., and K. have simply *Latinus Iunianus*; Hu. has *Latinus Iunianus heres instituti potest, et, etc.*

<sup>2</sup> See §§ 25 f.

<sup>3</sup> Comp. xvii, 1; Gai. ii, §§ 144, 286. To obtain the *ius capiendi* the celibate had to qualify himself

by marriage within the same period.

§ 4.    Comp. xxiv, 18; Gai. ii, 287.

§ 5.    Comp. xxiv, 28; Vlp. in fr. 1, § 1, D. *de libert. univ.* (xxxviii, 3); fr. 26, D. *ad SC. Trebell.* (xxxvi, 1); l. 12, C. *de hered. inst.* (vi, 24).

<sup>1</sup> So Bk., Vahl., Hu., and K. The ms. has *pherede herede cernere*; the earlier editions, including those of last century, *pro libito de herede cernere*.

6 consulto prospectum est. Deos heredes instituere non possumus praeter eos quos senatusconsulto constitutionibusue principum instituere concessum est, sicuti Iouem Tarpeium, Apollinem Didymaeum *Mileti*,<sup>1</sup> Martem in Gallia, Mineruam Iliensem, Herculem Gaditanum, Dianam Ephesiam, Matrem Deorum *Sipylensem*<sup>2</sup> quae Smyrnae<sup>3</sup> colitur, et Caelestem *sanctam deam*<sup>4</sup> Carthaginis.

7 Seruos heredes instituere possumus, nostros cum libertate, alienos sine libertate, communes cum libertate uel sine  
8 libertate. Eum seruum qui tantum in bonis noster est nec cum libertate heredem instituere possumus, quia latinitatem consequitur, quod non proficit ad hereditatem capiendam.  
9 Alienos seruos heredes instituere possumus eos

6 consult. We cannot institute deities as our heirs, except those whose institution has expressly been permitted by senatusconsult or imperial constitutions, such as the Tarpeian Jove, the Didymaeon Apollo of Miletus, Mars in Gaul, Minerva of Troy, Hercules of Cadiz, Diana of Ephesus, the Sipylenian Mother of the Gods worshipped at Smyrna, and Caelestis, the *holy goddess* of Carthage.

7 We may institute slaves as our heirs,—our own with liberty, other people's without it, common ones either with it or  
8 without it. We cannot institute one whom we hold only *in bonis*, even though with gift of freedom; for thereby he acquires [no more than] latinity, which does not avail him for  
9 taking an inheritance. Other people's slaves we can insti-

§ 6. Comp. Dio Cass. iv, 2; lxxix, 12; fr. 38, § 6, D. *de legat. III.* (xxxii).

<sup>1</sup> So M., Hu., and K., with good geographical reason; the ms. has *sicuti*, which Bk. retains.

<sup>2</sup> So Bk. The ms. has *Sipylensim*; Cuj. *Cybelen eam*. M. and Hu. read *Sipylenen*; the former, following Jahn, finding a use for the *sim* of the ms. by converting it into *Nemesim*, probably because this deity was figured on some of the coins of Smyrna. But *quae Smyrnae colitur* is equally applicable to Strabo's *θεὰ Σιπυλῆνη*, the Cybele of Mount Sipylus, in the vicinity of Smyrna.

<sup>3</sup> The ms. has *hysmirne*.

<sup>4</sup> The ms. has *Caelestem Salinensem Carthaginis*, which is retained by most eds. Hu. substitutes *Caelestem Selenen deam Carthaginis*.

But *Caelestis* is to be read here as the proper name of the deity, not as a mere epithet: see Capitolin. *Pertinax*, 4; *Macrin.* 3; Trebell. *Poll. Tyr. trig.* 29; Orelli and Henzen, nos. 1943, 5859. *Salinensis* may mean 'originally of Salinae,'—and there were many places of that name; but the inscription last referred to (discovered in Algeria), in its words '*deae sanctae Caelestis*,' suggests that the copyist may thus have corruptly rendered the contraction *scamdeam* (*sanctamdeam*). In the inscription first referred to, she is called *Caelestis Augusta Carthaginis*.

§§ 7-13. Comp. Gai. ii, §§ 185-190; pr. §§ 1-3, I. *de hered. inst.* (ii, 14).

§ 8. Cp. Gai. ii, 276, note; above, § 3.

§ 9. Comp. fr. 31, pr., fr. 32, D. *de her. inst.* (xxviii, 5).

*tantum*<sup>1</sup> quorum cum dominis testamenti factionem habemus.

- 10 Communis seruus cum libertate recte quidem heres instituitur  
quasi proprius pro parte nostra; sine libertate autem quasi  
11 alienus propter socii partem. Proprius seruus cum liber-  
tate heres institutus, si quidem in eadem causa permanserit,  
12 ex testamento liber et heres fit, id est necessarius. Quod  
si ab ipso testatore uiuente manumissus uel alienatus sit, suo  
arbitrio uel iussu emptoris hereditatem adire potest. sed si  
sine libertate sit institutus, omnino non consistit institutio.  
13 Alienus seruus heres institutus, si quidem in ea causa per-  
manserit, iussu domini debet hereditatem adire; quod si uiuo  
testatore manumissus aut alienatus a domino fuerit, aut suo  
arbitrio aut iussu emptoris poterit adire hereditatem.  
14 Sui heredes instituendi sunt uel exheredandi. sui autem  
heredes sunt liberi quos in potestate habemus, tam naturales  
quam adoptiui; item uxor quae in manu est, et nurus quae

- tute as our heirs only when we have *testamenti factio* with  
10 their owners. A slave that is common to us and some other  
person is rightly instituted with liberty, seeing that he is our  
property in so far as our share is concerned; or without it,  
seeing he is another person's so far as regards our partner's  
11 share. If the testator's own slave, instituted with freedom,  
continue in the same condition, he becomes free and heir  
12 under the testament, *i.e.* a necessary heir; but if he have  
been either manumitted or alienated by the testator himself  
during his lifetime, then he can enter at his own discretion  
[in the one case], or on the instruction of his purchaser [in  
the other]. If, however, he be instituted without accompany-  
13 ing gift of freedom, the institution fails entirely. Another  
person's slave, who has been instituted heir, if he remain in  
the same condition, must enter on his owner's instructions;  
but if he have been manumitted or alienated by his owner  
during the testator's lifetime, he can enter of his own accord  
[in the first case], by order of his purchaser [in the second].  
14 *Sui heredes* must be either instituted or disinherited. *Sui*  
*heredes* are the descendants whom we have in our *potestas*,  
whether natural or adoptive; together with our wife *in manu*,  
and our daughter-in-law *in manu* of a son *in potestate*.

<sup>1</sup> So Hugo and subsequent eds.;  
the MS. has *tamen*.

§ 10. Comp. Paul. iii, 6, § 4.

§ 12. Just. declared an express gift of  
freedom to be unnecessary, being

implied in the institution; pr. I.  
*de hered. inst.* (ii, 14).

§§ 14-22. Comp. Gai. ii, §§ 123-137  
tit. I. *de exher. lib.* (ii, 13).



- 15 in manu est filii quem in potestate habemus. Postumi quoque liberi, id est qui in utero sunt, si tales sunt ut nati in potestate nostra futuri sint, suorum heredum numero sunt.
- 16 Ex suis heredibus filius quidem neque heres institutus neque nominatim<sup>1</sup> exheredatus non patitur ualere testamentum.
- 17 Reliquae uero personae liberorum, uelut filia nepos neptis, si praeteritae sint, ualet testamentum, [*sed*] scriptis heredibus aderescent, suis quidem heredibus in partem uirilem, extraneis
- 18 autem in partem dimidiam. Postumi quoque<sup>2</sup> liberi cuiuscumque sexus omissi quod ualuit testamentum agnatione
- 19 rumpunt. Eos qui in utero sunt, si nati sui heredes nobis futuri sunt, possumus instituere heredes: si quidem post mortem nostram nascantur, ex iure ciuili; si uero uiuentibus nobis, ex lege *Iunia*.<sup>3</sup>
- 20 Filius qui in potestate est, si non instituatur heres, nominatim exheredari debet; reliqui sui heredes utriusque sexus
- 21 aut nominatim aut inter ceteros. Postumus filius nominatim exheredandus est; filia postuma ceteraeque postumae

- 15 After-born descendants too are classed amongst our *sui heredes*, i.e. such children in the womb as, were they already born,
- 16 would be in our *potestas*. The fact that a son, being one of our *sui heredes*, is neither instituted heir nor disinherited
- 17 by name, precludes the validity of our testament. If however other descendants, such as a daughter, grandson, or granddaughter, be passed over, the testament is valid; but they come in for a share along with the heirs that have been instituted,—with *sui* on a footing of equality, with strangers
- 18 for one-half of the inheritance. Omitted after-born descendants of either sex, by agnation [*i.e.* by their birth] break
- 19 a testament previously valid. We may institute as heirs children in the womb, provided they would have been amongst our *sui heredes* if already born; [we are entitled to do so], as regards those born after our death, by the *ius civile*, and as regards those born in our lifetime, by the *Iunia-Vellaeana* law.
- 20 A son *in potestate*, if he be not instituted heir, must be disinherited by name; other *sui heredes* of either sex may be
- 21 disinherited either by name or amongst ‘the others.’ An after-born son must be expressly disinherited; a daughter or

<sup>1</sup> After *nominatim* the MS. has *quo*; Vahl. substitutes *uō* (*ut oportet*), which finds a justification in xxiii, 2.

<sup>2</sup> Hu. substitutes *quicunque*.

<sup>3</sup> The MS. has *Iulia*. But the law referred to seems to be the *lex Iunia Vellaea*; see Gai. ii, 134, and note.

- feminae uel nominatim uel inter ceteros, dummodo inter  
 22 ceteros exheredatis aliquid legetur. Nepotes et pronepotes, ceterique masculi postumi praeter filium, uel nominatim uel inter ceteros cum adiectione legati sunt exheredandi; sed tutius est tamen nominatim eos exheredari; et id obseruatur magis.
- 23 Emancipatos liberos *quamuis iure*<sup>1</sup> ciuili neque heredes instituere neque exheredare necesse sit, tamen praetor iubet, si non instituantur heredes, exheredari, masculos omnes nominatim, feminas uel [*nominatim uel*]<sup>2</sup> inter ceteros; alioquin contra tabulas bonorum possessionem eis pollicetur.
- 24 Inter necessarios heredes, id est seruos cum libertate heredes scriptos, et suos et necessarios, id est liberos qui in potestate sunt, iure ciuili nihil interest: nam utrique etiam inuiti heredes sunt. sed iure praetorio suis et necessariis heredibus abstinere se a parentis hereditate permittitur; necessariis autem tantum heredibus abstinendi potestas non datur.
- 25 Extraneus heres, siquidem cum cretione sit heres institutus,

- 
- other female after-born may be disinherited either expressly or in the *ceteri* clause, provided in the latter case that some  
 22 legacy is left her. Grandsons, great-grandsons, and all other male after-born descendants than a son, may be disinherited either expressly or amongst 'the others,' [in the latter case] with bequest of a legacy; but it is safer to disinherit them by name; and this is the usual practice.
- 23 Although by the *ius ciuile* it is unnecessary either to institute or disinherit emancipated children, yet the praetor requires that, if not instituted, they shall be disinherited,—males, without exception, by name, females *either by name* or in the *ceteri* clause; otherwise he grants them possession of the deceased's estate in opposition to the testament.
- 24 By the *ius ciuile* there is no difference between *heredes necessarii*, i.e. slaves instituted heirs with freedom, and *sui et necessarii*, i.e. descendants *in potestate* of the testator; for both become heirs whether they will or not. But by the praetorian law *sui et necessarii* are allowed to abstain from the inheritance of a parent; to heirs who are simply *necessarii*, however, this power of abstaining is not conceded.
- 25 A stranger heir, if he be instituted with cretione, becomes

§ 23. Comp. Gai. ii, 135; below, xxviii.

<sup>2</sup> Added by K.

§§ 2-4.

§ 24. Comp. Gai. ii, §§ 153, 156, 160.

<sup>1</sup> So Schill. and all recent eds.; the ms. has *qui in re*.

§§ 25-30. Comp. Gai. ii, §§ 164-170; Paul. iv, 8, 25.

- cernendo fit heres ; *si uero*<sup>1</sup> sine cretione, pro herede gerendo.  
 26 Pro herede gerit qui rebus hereditariis tamquam dominus  
 utitur, uelut qui *auktionem*<sup>2</sup> rerum hereditariarum facit aut  
 27 seruis hereditariis cibaria dat. Cretio est certorum dierum  
 spatium quod datur instituto heredi ad deliberandum utrum  
 expediat<sup>3</sup> ei adire hereditatem nec ne, uelut : TITIVS HERES  
 ESTO, CERNITOQVE IN DIEBUS CENTVM PROXIMIS QVIBVS SCIERIS  
 28 POTERISQVE : NISI ITA CREVERIS EXHERES ESTO. Cernere est  
 uerba cretionis dicere ad hunc modum : *QVOD ME MEVIUS*<sup>4</sup>  
 29 HEREDEM INSTITVIT EAM HEREDITATEM ADEO CERNOQVE. Sine  
 cretione heres institutus, si constituerit nolle se heredem esse,  
 statim excluditur ab hereditate et amplius eam adire non  
 30 potest. Cum cretione uero heres institutus, sicut cernendo  
 fit heres, ita non aliter excluditur quam si intra diem cretionis  
 non creuerit : ideoque etiamsi constituerit nolle se heredem  
 esse, tamen, si supersint dies cretionis, poenitentia actus cer-  
 nendo heres fieri potest.  
 31 Cretio aut uulgaris dicitur aut continua : uulgaris, in qua

- 26 heir by cerning ; if without it, by behaving as heir. He  
 behaves as heir who deals with the hereditary estate as if it  
 were his own, as for instance when he puts up things belong-  
 ing to it to auction, or furnishes the slaves belonging to it  
 27 with food. Cretion is a certain period of time allowed to  
 the instituted heir for deliberating whether or not it will be  
 for his advantage to enter to the inheritance, thus : 'Titius be  
 heir, and cern within the next hundred days after you know  
 28 and can ; if you have not thus cerned, be disinherited.' To  
 cern is to recite the words of cerniture in this way : 'Whereas  
 Mevius has instituted me his heir, I hereby enter to and cern  
 29 his inheritance.' An heir instituted without cretion, if he  
 have declared his resolution not to be heir, is at once excluded  
 from the inheritance, and has no further opportunity of enter-  
 30 ing. He, however, who is instituted with cretion, as he  
 becomes heir by cerning, is not otherwise excluded than by  
 failing to cern within the cretionary period ; therefore,  
 although he may have [informally] declared that he does not  
 mean to be heir, yet if there be still part of the time for  
 cretion unexpired, repenting of what he has done he may still  
 become heir by cerning.

- 31 Cretion is styled either common or continuous,—common,

<sup>1</sup> The ms. has *sive*.

<sup>2</sup> The ms. has *actionem*.

<sup>3</sup> The ms. has *expiat*.

<sup>4</sup> The ms. has *cum id meuius* ;

but see Gai. ii, 166.

§§ 31, 32. Comp. Gai. ii, §§ 171, 172.

- adiciuntur haec uerba: QVIBVS SCIERIS POTERISQVE; continua,  
 32 in qua non adiciuntur. Ei qui uulgarem cretionem habet  
 dies illi *tantum*<sup>1</sup> computantur quibus *sciit*<sup>2</sup> se heredem institu-  
 tum esse et potuit cernere; ei uero qui continuam habet cretio-  
 nem etiam illi dies computantur quibus ignorauit se heredem  
 institutum, aut sciuit quidem sed non potuit cernere.
- 33 Heredes aut instituti dicuntur aut substituti: [*instituti*],  
 qui primo gradu scripti sunt; substituti, qui secundo gradu  
 uel sequentibus heredes scripti sunt, uelut: TITIVS HERES  
 ESTO, CERNITOQVE IN DIEBVS PROXIMIS CENTVM QVIBVS SCIES  
 POTERISQVE: [*QVODNI*]<sup>1</sup> ITA CREVERIS, EXHERES ESTO. TVNC  
 MEVIVS HERES ESTO, CERNITOQVE IN DIEBVS et reliqua. similiter  
 et deinceps substitui potest.
- 34 Si sub imperfecta cretione heres institutus sit, id est non  
 adiectis his uerbis: SI NON CREVERIS EXHERES ESTO, sed si ita:  
 SI NON CREVERIS, TVNC MEVIVS HERES ESTO, cernendo quidem  
 superior inferiorem excludit; non cernendo autem, sed pro

- when the words 'in which you know and can' are added,  
 32 continuous, when those words are not added. Against him  
 who has common cretion those days only are counted in which  
 he knows that he has been instituted heir and is in a position  
 to cern; against him, on the other hand, whose cretion is con-  
 tinuous, even that time is counted in which he was ignorant  
 that he had been instituted heir, or may have known it per-  
 haps but was unable to cern.
- 33 Heirs are called either institutes or substitutes,—institutes,  
 when their names are mentioned in the testament in the first  
 place, substitutes when in the second or a subsequent place,  
 thus: 'Titius be heir, and cern within the next hundred days  
 after you know and can; if you do not so cern, be disin-  
 herited; then Mevius be heir, and cern within the next  
 hundred days,' etc. And any number of successive substitu-  
 tions may be made in the same way.
- 34 If an heir be instituted under an imperfect cretion-clause,  
*i.e.* one in which the words are not 'If you have not cerned,  
 be disinherited,' but 'If you have not cerned, then Mevius be  
 heir,' the institute by cerning excludes the substitute; if he  
 do not cern, however, but only behave as heir, he lets in the

<sup>1</sup> So K.; the MS. has *dantur*; most eds. *duntaxat*.

<sup>2</sup> The MS. has *sciit*; Bk. and K. *sciuit*. But see Fr. Vat. §§ 1, 156.

§ 33. Comp. Gai. ii, §§ 174-176.

<sup>1</sup> So Bk. and subsequent eds., on the authority of Gai. ii, 174; omitted in the MS.; by earlier eds. *nisi*.

§ 34. Comp. Gai. ii, §§ 177, 178, where, however, there is no men-



herede gerendo, in partem admittit substitutum. sed postea diuus Marcus constituit ut et pro herede gerendo ex asse fiat heres.<sup>1</sup> quod si neque creuerit neque pro herede gesserit, ipse excluditur et substitutus ex asse fit heres.<sup>1</sup>

[XXIII. QVEMADMODVM TESTAMENTA RVMPVNTVR.]

- 1 Testamentum iure factum infirmatur duobus modis, si ruptum aut irritum factum sit.
- 2 Rumpitur testamentum mutatione, id est si postea aliud testamentum iure factum sit; item agnatione, id est si suus heres agnascatur, qui neque heres institutus neque ut oportet
- 3 exheredatus sit. Agnascitur suus heres aut agnascendo, aut adoptando, aut in manum conueniendo, aut in locum sui heredis succedendo, uelut nepos mortuo filio uel emancipato,

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substitute for a part of the inheritance. (But the late emperor Marcus afterwards provided by a constitution of his that by simply behaving as heir the institute should become heir to the whole of it.) If he have neither earned nor behaved as heir, then the institute is altogether excluded, and the substitute becomes heir to the whole inheritance.

[XXIII. HOW TESTAMENTS ARE BROKEN.]

- 1 A testament made according to the requirements of law is invalidated in either of two ways,—if it be broken, or if it be irritated.
- 2 A testament is broken by *mutatio*, i.e. if subsequently another testament be made with all legal formalities; also by *agnatio*, i.e. if a *suius heres* come into existence who has neither been instituted heir nor disinherited as the law prescribes.
- 3 A *suius heres* comes into existence either by birth, or by adoption, or by *in manum conuentio*, or by stepping by succession into the place of another *suius heres* (as a grandson into the place of a deceased or emancipated son), or by manumission,

tion of the constitution of Marc. Aurelius.

<sup>1</sup> Equivalent to the *in totam hereditatem succedit* of Gai. The entire estate was figured as an *as*, divisible into so many twelfths (*unciae*) or multiples of a twelfth; see § 5, l. *de hered. inst.* (ii, 14).

TIT. XXIII, § 1. Comp. pr. I. *quib. mod. test. infirm.* (ii, 17).

§ 2. Comp. Gai. ii, §§ 144, 131; above xxii, §§ 14-18.

§ 3. Comp. Gai. ii, §§ 133, 138-141, 159; iii, 6; Paul. in *Collat.* xvi, 3, § 7.

- aut manumissione, id est si filius ex prima secundaue mancipatione manumissus reuersus sit in patris potestatem.
- 4 Inritum fit testamentum si testator capite deminutus fuerit, aut si iure facto testamento nemo extiterit heres.
- 5 Si is qui testamentum fecit ab hostibus captus sit, testamentum eius ualet ; si quidem reuersus fuerit, iure postliminii, si uero ibi decesserit, ex lege Cornelia, *quae* perinde successionem eius confirmat atque si in ciuitate decessisset.
- 6 Si septem signis testium signatum sit testamentum, licet iure ciuili ruptum uel inritum factum sit, praetor scriptis heredibus iuxta tabulas bonorum possessionem dat, si testator et ciuis Romanus et suae potestatis cum moreretur fuit ; quam bonorum possessionem cum re, id est cum effectu habent, si nemo alius iure heres sit.
- 7 Liberis inpueribus in potestate manentibus, tam natis quam postumis, heredes substituere parentes possunt duplici modo, id est aut eo *quo* extraneis, ut si heredes non extiterint

*i.e.* by the return into the *patria potestas* of a son manumitted from a first or second mancipation.

- 4 A testament is irritated when the testator suffers *capitis deminutio*, or when, though executed in all respects regularly, no one has become heir under it.
- 5 If a man who has made a testament be taken captive by an enemy, his deed is nevertheless valid : if he have returned home, it is so *iure postliminii* ; if he have died in captivity, it is so by the Cornelian law, which declares that his succession shall hold good just as if he had died a citizen.
- 6 If a testament be sealed with the seals of seven witnesses, then, notwithstanding that according to the *ius ciuile* it may have been broken or irritated, the praetor gives to the heirs named in it possession of the estate in terms of the deed, provided the testator was a Roman citizen and *sui iuris* when he died ; and this possession will be *cum re*, *i.e.* effectual to them, if there be no other person whom the law prefers as heir.
- 7 To his impuberate children *in potestate*, both born and to be born, a parent may substitute heirs in two ways,—either in that employed in substituting to strangers, viz. that if the
- § 4. Comp. Gai. ii, §§ 144-146.

§ 5. Comp. Paul. iii, 4a, § 8 ; § 4, I. *quib. non est perm.* (ii, 12).

§ 6. Comp. Gai. ii, §§ 119, 147-149, where he indicates the cases in which an heir-at-law was preferred

to the *heredes scripti*, and the possession of the latter consequently was *sine re*. See also below, xxviii, §§ 6, 13.

§§ 7-9. Comp. Gai. ii, 179-184.

- liberi substitutus heres fiat; aut proprio iure, id est [ut] si post mortem parentis heredes facti intra pubertatem decederint substitutus heres fiat. Etiam exheredatis filiis substituere parentibus licet. Non aliter inpuberi filio substituere quis heredem potest quam si sibi *prius*<sup>1</sup> heredem instituerit uel ipsum filium uel quemlibet alium.
- 10 Milites *quomodocumque*<sup>1</sup> fecerint testamenta, ualent, id est etiam sine legitima obseruatione. nam principalibus constitutionibus permissum est illis, quomodocumque uellent, quomodocumque possent, testari. idque *testamentum quod miles*<sup>2</sup> contra iuris regulam fecit ita demum ualet, si uel in castris mortuus sit uel post missionem intra annum.

## [XXIII. DE LEGATIS.]

- 1 Legatum est quod legismodo, id est imperatiue, testamento relinquitur. Nam ea quae precatiuo modo relinquuntur fideicommissa uocantur.

- children shall not have become heirs the substitute shall be heir, or in one appropriate to the particular case, viz. that if they have become heirs after their parent's death, but have died before reaching puberty, then the substitute shall be heir.
- 8 A parent may make a [pupillary] substitution even to his disinherited children. But no one can thus substitute an heir to his impubertate child, unless he has first instituted as his own heir either that child or some other person.
- 10 The testaments of soldiers are valid however made, that is to say even though the legal formalities have not been observed; for by imperial constitutions soldiers are allowed to test in any way they like, in any way they can. And such a testament made by a soldier, contrary to the rules of the common law, is held valid if he die either in active service or within a year after his discharge.

## [XXIV. OF LEGACIES.]

- 1 A legacy is what is bequeathed in a testament by a *lex*, that is, imperatively. For what are bequeathed in words of request are called *fideicommissa*.

<sup>1</sup> So most recent eds., following Vlp. in fr. 2, § 4, D. *de uulg. subst.* (xxviii, 6); the ms. has *quis*.

§ 10. Comp. Gai. ii, §§ 109-111, 114; above, xx, 10.

<sup>1</sup> The ms. has *commodocumque*.

<sup>2</sup> So most eds., following Du Tillet; the ms. has *testamento cum illis*.

TIT. XXIV, § 1. Comp. pr. tit. I. *de legat.* (ii, 20); Gai. ii, 104, note 8.

2 Legamus autem quattuor modis: per uindicationem, per  
 3 damnationem, sinendi modo, per praeceptionem. Per uin-  
 dicationem his uerbis legamus: DO LEGO, CAPITO, SVMITO, SIBI<sup>1</sup>  
 4 HABETO. Per damnationem his uerbis: HERES MEVS DAMNAS  
 5 ESTO DARE, DATO, FACITO, HEREDEM MEVM DARE IVBEO. Si-  
 nendi moda ita: HERES MEVS DAMNAS ESTO SINERE LVCIVM  
 6 TITIVM SVMERE ILLAM REM SIBIQUE HABERE. Per praecep-  
 tionem sic: LVCIVS TITIVS ILLAM REM PRAECIPITO.  
 7 Per uindicationem legari possunt res quae utroque tempore  
 ex iure Quiritium testatoris fuerunt, mortis et *quo*<sup>1</sup> testamen-  
 tum faciebat, praeterquam si pondere numero mensura con-  
 tineantur; in his enim satis est si uel mortis dumtaxat tem-  
 8 pore [*eius*]<sup>2</sup> fuerint ex iure Quiritium. Per damnationem  
 omnes res legari possunt, etiam quae non sunt testatoris,  
 9 dummodo tales sint quae dari possint: liber homo aut res  
 populi aut sacra aut religiosa nec per damnationem legari  
 10 potest, quoniam dari non potest. Sinendi modo legari

2 We legate in four ways,—by vindication, damnation, per-  
 3 mission, and preception. By vindication we legate thus:  
 4 ‘I give and legate,’ ‘take,’ ‘have for yourself;’ by dam-  
 nation thus: ‘Be my heir bound to give,’ ‘let my heir give’  
 5 or ‘do,’ ‘I order my heir to give;’ by permission thus:  
 6 ‘Be my heir bound to let Lucius Titius take such or such a  
 thing and have it for himself;’ by preception thus: ‘Let  
 Lucius Titius first take such or such a thing.’  
 7 By vindication those things may be bequeathed that be-  
 longed to the testator on quiritary title both at the time of  
 his death and when he made his testament, except things  
 passing by weight, number, or measure; as regards them it is  
 enough that they were his *ex iure Quiritium* though only at  
 8 the time of his death. By damnation anything whatever  
 may be legated, even though not the property of the testator,  
 9 provided it be such as can be given: a freeman, or a thing  
 belonging to the people, or a thing that is sacred or religious,  
 cannot be legated even by damnation, because it cannot be  
 10 given. By permission such things may be legated as are

§ 2. Comp. Gai. ii, 192; § 3, I. *de legat.* Bk. and Hu. *quam*; most eds.  
 (ii, 20). *quando*.  
 § 3. Comp. Gai. ii, 193. <sup>2</sup> So Hu.; L. and Bk. insert *tes-*  
<sup>1</sup> The ms. has *sive*; but see Gai. *tatoris*; many eds. leave the text as  
 in the ms.  
 § 4. Comp. Gai. ii, 201.  
 § 5. Comp. Gai. ii, 209.  
 § 6. Comp. Gai. ii, 216.  
 § 7. Comp. Gai. ii, 196.  
 § 8. Comp. Gai. ii, §§ 197, 202.  
 § 9. Comp. Vlp. in fr. 39, §§ 8-10, D.  
*de legat. I.* (xxx); Gai. iii, 97.  
<sup>1</sup> So K.; the ms. has *quomodo*; § 10. Comp. Gai. ii, 210.



- 11 possunt res propriae testatoris et heredis eius. Per praeceptionem legari possunt res quae etiam per uindicationem.
- 11a Si ea res quae non fuit utroque tempore testatoris ex iure Quiritium per uindicationem legata sit, licet iure ciuili non ualeat legatum, tamen senatusconsulto Neroniano firmatur,<sup>1</sup> quo cautum est ut quod minus *pactis*<sup>2</sup> uerbis legatum est perinde sit ac si optimo iure legatum esset: optimum autem ius legati per damnationem est.
- 12 Si duobus eadem res per uindicationem legata sit, siue coniunctim, uelut: TITIO ET SEIO HOMINEM STICHVM DO LEGO, [*siue disiunctim, uelut: TITIO HOMINEM STICHVM DO LEGO, SEIO [EVNDEM HOMINEM DO LEGO],*]<sup>1</sup> iure ciuili concursu partes fiebant, non *concurrente* altero pars eius alteri adcrecebat:<sup>2</sup> sed post legem Papiam Poppaeam non capientis pars caduca
- 13 fit.<sup>3</sup> Si per damnationem eadem res duobus legata sit, si quidem coniunctim, singulis partes debentur, et non capientis

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11 the property of the testator or his heir. By preception the same things may be legated as by vindication.

11a If a thing that was not the testator's in quiritary right at both dates have been legated by vindication, although by the *ius ciuile* the legacy is invalid, yet it is confirmed by the Neronian senatusconsult. For it is thereby provided that a legacy clothed in inappropriate words shall be treated as if bequeathed in the most advantageous form; and the most advantageous form of legacy is that by damnation.

12 If the same thing had been left by vindication to two persons, either conjointly thus: 'To Titius and Seius I give and legate the slave Stichus,' [*or disjointly thus: 'To Titius [I give and legate the slave Stichus; to Seius I give and legate [the same slave,]*'] concourse, according to the *ius ciuile*, created a share in each, while if one of the legatees did not concur, his share accresced to the other; since the enactment of the Papian law, however, the share of the non-taker becomes

13 caducous. If the same thing be bequeathed to two legatees by damnation, and that conjointly, a share of it is due to each,

§ 11. Comp. Gai. ii, §§ 220-222.

§ 11a. Comp. Gai. ii, 197.

<sup>1</sup> Hu. reads *confirmatur*.

<sup>2</sup> So the ms. Many amendments have been proposed,—*aptis, rectis, iustis, perfectis, ratis, probatis, exactis*, etc. But Dirks. (*Manuale*, v. *Pactus*) assumes the correctness of *pactis*, and defines it as *solemniter*

*expressis*.

§§ 12, 13. Comp. Gai. ii, §§ 199, 205-208; § 8, I. *de legat.* (ii, 20).

<sup>1</sup> Added from Gai. by Hugo and all recent eds.

<sup>2</sup> On *ius adcrecendi* comp. frs. 34-36, D. *ad L. Aquil.* (ix, 2).

<sup>3</sup> On *caduca* see xvii, 2; xix, 17.

pars iure ciuili in hereditate remanebat, nunc autem caduca fit; quod si disiunctim, singulis solidum debetur.

- 14 Optione autem legati per uindicationem data, legatarii electio est, ueluti: HOMINEM OPTATO, ELEGITO; idemque est et si tacite — — — HOMINEM — — HERES — — — HOMINEM DARE, heredis electio est [*quem*]<sup>1</sup> uelit dare.

- 15 Ante heredis institutionem legari non potest, quoniam [*uis*]<sup>1</sup> et potestas testamenti ab heredis institutione incipit.

- 16 Post mortem heredis legari non potest, ne ab heredis herede legari uideatur, quod iuris ciuilis ratio non patitur. *in*<sup>1</sup>

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—by the *ius ciuile* the share of a non-taker remained in the inheritance, but now becomes caducous; but if it be bequeathed disjointly, each is entitled to the whole.

- 14 When the option of a legacy is bequeathed by vindication, in such words as 'choose (or select) a slave,' the choice is with the legatee; and so it is when I have tacitly [*bequeathed a choice in this way: 'I give and legate*] a slave.' [*But if bequeathed thus: 'Let*] my heir [*be bound*] to give a slave,' the election is the heir's to give what slave he pleases.

- 15 A man cannot legate until he has instituted an heir; for the force and power of the testament begins at the institution.

- 16 A legacy cannot be bequeathed [to take effect] after the heir's death; for this would be to charge it upon the heir's heir, which is contrary to the principle of the *ius ciuile*. But it

§ 14. Comp. §§ 22, 23, I. *de legat.* (ii, 20). The ms. does not exhibit the same defects as in the text; for there the lacunae are filled up in a hand of the sixteenth century as follows: et si tacite *legauerim Titio hominem aut decem*, heres *meus dato hominem dare*, etc.,—a reconstruction that is on all hands discredited. Cuj. (*Obs.* xvii, 28) suggested—idemque est si *generaliter* (instead of *tacite*) *legauerim Titio hominem. At si ita*: HERES MEVS DAMNAS ESTO HOMINEM DARE, etc. Savigny (*Obl.* i, p. 393) proposes a reading that so far commends itself, but that necessitates the alteration of *hominem* (between the first and second lacuna) into *optionem*: idemque est et si tacite *legauerim optionem. At si ita*: HERES MEVS DAMNAS ESTO HOMINEM DARE, etc. Hu., following L., has—idemque est et

si tacite *data sit optio hoc modo*: TITIO HOMINEM DO LEGO. si uero *per damnationem*, uelut HERES MEVS DAMNAS ESTO HOMINEM DARE, etc. From the last two reconstructions a reading may be extracted that is more satisfactory than either,—than the first because it utilizes the *hominem* of the ms., and than the second because it does not so overcrowd the lacunae: idemque est et si tacite *optionem legauerim hoc modo*: HOMINEM DO LEGO. *At si ita*: HERES MEVS DAMNAS ESTO HOMINEM DARE, etc.

<sup>1</sup> Added by Cuj.

§ 15. Comp. Gai. ii, 229.

<sup>1</sup> Added by L. on authority of Gai. as quoted.

§ 16. Comp. Gai. ii, 232; below, xxv, 8.

<sup>1</sup> So most eds.; the ms. has *et*; L. and Bk. *ad*.

mortis autem heredis tempus legari potest, uelut : CVM HERES MORIETVR.

- 17 Poenae causa legari non potest. poenae autem causa legatur quod coercendi heredis [*causa*]<sup>1</sup> relinquitur, ut faciat quid aut non faciat, non ut [*ad*] legatarium pertineat, ut puta hoc modo : SI FILIAM TVAM IN MATRIMONIUM TITIO CONLOCAVERIS, DECEM MILIA SEIO DATO.
- 18 Incertae personae legari non potest, ueluti : QVICVMQVE FILIO MEO FILIAM SVAM IN MATRIMONIUM CONLOCAVERIT, EI HERES MEVS<sup>1</sup> TOT MILIA DATO. sub certa tamen demonstratione incertae personae legari potest, uelut : EX COGNATIS MEIS QVINVC SVNT, QVI PRIMVS AD FVNVS MEVM VENERIT, EI HERES MEVS ILLVD DATO.
- 19 Neque ex falsa demonstratione neque ex falsa causa legatum infirmatur. falsa demonstratio est uelut : TITIO FVNDSVM QVEM A TITIO·EMI DO LEGO, cum is fundus a Titio emptus non sit. falsa causa est uelut : TITIO, QVONIAM NEGOTIA MEA

may be bequeathed [to take effect] at the moment of the heir's death, as 'when my heir is dying.'

- 17 A thing cannot be legated by way of penalty. And that is legated by way of penalty which is left for the purpose of constraining the heir to do or forbear from doing something, rather than to benefit the legatee, as for instance thus : 'If you fail to bestow your daughter in marriage on Titius, then give Seius ten thousand sesterces.'
- 18 There can be no legacy to an uncertain person, as thus : 'My heir shall give so many thousands to any one who gives his daughter in marriage to my son.' One may legate, however, to an uncertain person definitely described, for instance thus : 'To that man amongst those now my kinsmen who first comes to my funeral let my heir give so-and-so.'
- 19 A legacy is not invalidated either by an erroneous description or an erroneous [statement of the] cause of granting. There is an erroneous description in the words—'I give and legate to Titius the land I bought from him,' if in fact it was not bought from him. There is an erroneous cause of granting assigned in the words—'I give and legate the land to

17. Comp. Gai. ii, 235 ; below, xxv, 13.

<sup>1</sup> Added from Gai.

§ 18. Comp. Gai. ii, 238 ; above, xxii, 4 ; below, xxv, 13.

<sup>1</sup> So Schult. and all subsequent eds.; the ms. has *homini*.

§ 19. Comp. §§ 30, 31, I. *de legat.* (ii, 20).

CVRAVIT, FVNDVM DO LEGO, *cum* negotia eius numquam Titius curasset.

- 20 A legatario legari non potest. [21] Legatum ab eo tan-  
 21 tum dari potest qui (*heres scriptus est*):<sup>1</sup> ideoque filio familie  
 herede instituto uel seruo, neque a patre neque a domino legari  
 22 potest. Heredi a semet ipso legari non potest. [23] Ei  
 23 qui in potestate manu mancipione est scripti heredis sub con-  
 ditione legari potest, ut requiratur quo tempore dies legati  
 24 cedit in potestate heredis non sit. Ei cuius in potestate  
 manu mancipione est heres scriptus legari [non] potest.  
 25 Sicut singulae res legari possunt, ita uniuersarum quoque  
 summa legari potest, ut puta [*hoc*] modo: HERES MEVS CVM  
 TITIO HEREDITATEM MEAM PARTITO,<sup>1</sup> DIVIDITO; quo casu dimidia

Titius because he managed my affairs for me,' if in fact Titius had never managed affairs of the testator's.

- 20 A legacy cannot be charged on a legatee. [21] He only  
 21 can be burdened with it who *is named heir in the testament*;  
 therefore if it be a *filiusfamilias* or a slave that is instituted  
 heir, a legacy cannot be charged upon his *paterfamilias* or  
 22 owner. The heir cannot be burdened with a legacy to  
 23 himself. A legacy may be left conditionally to a person in  
 the *potestas*, *manus*, or *mancipium* of the instituted heir; but  
 [to make it effectual] it is requisite that, when the time of  
 vesting arrives, the legatee shall be no longer in the heir's  
 24 *potestas*. A legacy cannot be bequeathed to the person  
 in whose *potestas*, *manus*, or *mancipium* the instituted heir  
 happens to be.  
 25 Just as individual articles may be bequeathed, so may a  
 certain amount of [the testator's] aggregate estate, for instance  
 thus: 'My heir is to share (or divide) the inheritance with  
 Titius.' In this case there is held to be a legacy of one-half

§ 20. Comp. Gai. ii, §§ 260, 271.

§ 21. Comp. xxv, 10.

<sup>1</sup> There is here a lacuna in the ms., which has been filled in the sixteenth century with the words *extraneus est*. The reading in the text is that of L., on authority of xix, 13. Hu. and K. have *heres institutus est*.

§ 22. Comp. fr. 116, § 1, D. *de legat. I.* (xxx).

§ 23. Comp. Gai. ii, 244; § 32, I. *de legat.* (ii, 20), on the strength of which many eds. interpolate *an* after *requiratur*.

§ 24. Comp. Gai. ii, 245; § 33, I. *de*

*legat.* (ii, 20). Most eds., from Cuj. downwards, agree that the *non* (in brackets) should be deleted. Hu. retains it by assuming a homeoteleutic omission and reading—*legari [potest, etiam sine condicione; si tamen heres ab eo factus sit, legatum consequi] non potest*. This is in accordance with the Inst., which, for *consequi non potest*, uses the word *evanescit*.

§ 25. Comp. Gai. ii, 254; fr. 164, § 1, D. *de V. S.* (l, 16).

<sup>1</sup> So the ms.; Schult., L., and K. prefer *partitor*.



- pars bonorum legata uidetur. potest autem et alia pars, uelut tertia uel quarta, legari. quae species partitio *appellatur*.<sup>2</sup>
- 26 Ususfructus legari potest iure ciuili earum rerum quarum salua substantia utendi fruendi potest esse facultas: et tam
- 27 singularum rerum quam plurium; *item* partis. Senatusconsulto cautum est ut etiamsi earum rerum quae in abusu continentur, ut puta uini olei tritici, ususfructus legatus sit, legatario res tradantur, cautionibus interpositis de restituendis eis cum ususfructus ad legatarium pertinere desierit.
- 28 Ciuitatibus omnibus quae sub imperio *populi Romani*<sup>1</sup> sunt legari potest; idque a diuo Nerua introductum, postea a senatu auctore Hadriano diligentius constitutum est.
- 29 Legatum, quod datum est, adimi potest uel eodem testamento uel codicillis testamento confirmatis, dum tamen eodem modo adimatur quo modo datum est.<sup>1</sup>

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of the estate; but any other part, a third say, or a fourth, may be bequeathed. A legacy of this sort is styled *partitio*.

- 26 According to the *ius ciuile* the usufruct can be legated of things which are capable of being used, and whose fruits can be taken, without diminishing their substance; and it may be a usufruct of one thing or of several, or of a part [of the
- 27 whole estate]. And it is provided by senatusconsult that if a usufruct be bequeathed even of things whose use lies in their consumption, wine say, or oil, or wheat, they shall be delivered to the legatee, on his giving security for restitution [of an equal quantity] when the usufruct has ceased to belong to him.
- 28 A man may legate to any municipal corporation within the Empire; a power first conferred upon testators by the emperor Nerva, and afterwards more carefully defined by the senate at the instance of Hadrian.
- 29 A legacy that has been bequeathed may be adeemed either in the same testament or in a codicil confirmed by it; but it must be adeemed in the same way in which it has been given.

<sup>2</sup> This word is in the MS., but in a later hand.

§ 26. Comp. pr. § 1, I. *de usufr.* (ii, 4); fr. 43, D. *de usufr. leg.* (xxxiii, 2).

§ 27. Comp. § 2, I. *de usufr.* (ii, 4), and refs.

§ 28. Comp. xxii, 5; fr. 117, fr. 122, pr., fr. 73, § 1, fr. 32, § 1, D. *de legat. I.* (xxx).

<sup>1</sup> Again *praetoriani* in the MS.; see xx, 16.

§ 29. Comp. pr. I. *de adempt. leg.* (ii, 21).

<sup>1</sup> Comp. fr. 14, D. *de acceptil.* (xli, 4). The words of ademption were to be a repetition of those of bequest, with the addition of a negative: *do lego, non do non lego; heres dato, heres ne dato*.

- 30 Ad heredem legatarii legata non aliter transeunt nisi si iam  
 31 die legatorum cedente legatarius decesserit. Legatorum  
 quae pure uel in diem certum<sup>1</sup> relicta sunt dies cedit antiquo  
 quidem iure ex mortis testatoris tempore; per legem autem  
*Papiam Poppaeam* ex apertis tabulis testamenti: eorum uero  
 quae sub condicione<sup>1</sup> relicta sunt cum condicio extiterit.
- 32 Lex Falcidia iubet non plus quam dodrantem totius patri-  
 monii legari, ut omni modo quadrans integer apud heredem  
 remaneat.
- 33 Legatorum perperam solutorum repetitio non est.

## [XXV. DE FIDEICOMMISSIS.]

- 1 Fideicommissum est quod non ciuilibus uerbis sed precatue  
 relinquitur, nec ex rigore iuris ciuilis proficiscitur, sed ex

- 30 Legacies do not pass to the heir of the legatee unless they  
 31 have already vested before the latter's decease. Those left  
 unconditionally or [to be paid] at a fixed date vested by the  
 old law at the testator's death; by the *Papia-Poppaean* law,  
 however, they vest at the opening of the testament. But  
 those that are conditional vest only when the condition is  
 fulfilled.
- 32 The Falcidian law ordains that not more than three-fourths  
 of the testator's patrimony shall be legated; so that in every  
 case a clear fourth shall remain to the heir.
- 33 There can be no repetition of a legacy paid inadvertently.

## [XXV. OF FIDEICOMMISSA.]

- 1 A *fideicommissum* is bequeathed not in the language of the  
*ius ciuile* but by words of request; according to the strictness  
 of the *ius ciuile* it is ineffectual; it derives its value solely

§§ 30, 31. Comp. Vlp. fr. 5, fr. 7, D.  
*quando dies leg. ced.* (xxxvi, 2);  
 Inst. in l. 1, § 5, C. *de cad. toll.*  
 (vi, 51).

<sup>1</sup> Says fr. 75, D. *de cond.* (xxxv,  
 1), *Dies incertus condicionem in te-  
 stamento facit.* The only uncertain  
 date that formed an exception was  
 that of the death of the testator; a  
 legacy, therefore, on the testator's  
 death was regarded as uncondi-  
 tional, and vested at once, fr. 79,  
*de cond.* But if the reference was  
 to any other uncertain date, even

though it was sure to come sooner  
 or later, such as the death of a third  
 party, the legacy did not vest un-  
 less the legatee survived it; in other  
 words, the legacy was dealt with as  
 a conditional one.

§ 32. Comp. Gai. ii, §§ 224-227.

§ 33. Comp. Gai. ii, 169. Hu. reads  
 —*legatorum* [per damnationem] *per-  
 peram*, etc.

TIT. XXV, § 1. Comp. xxiv, 1; §§ 1,  
 12, I. *de fideicom. hered.* (ii, 23);  
 § 3, I. *de legat.* (ii, 20).

- 2 uoluntate datur relinquentis. Verba fideicommissorum in  
usu fere haec sunt: FIDEICOMMITTO, PETO, VOLO DARI et similia.  
3 Etiam nutu relinquere fideicommissum usu receptum est.  
4 Fideicommissum relinquere possunt qui testamentum facere  
possunt, licet non fecerint: nam intestato quis moriturus  
5 fideicommissum relinquere potest. Res per fideicommissum  
relinqui possunt quae etiam per damnationem legari pos-  
6 sunt. Fideicommissa dari possunt *his quibus*<sup>1</sup> legari potest.  
7 Latini Iuniani fideicommissum capere possunt, licet legatum  
8 capere non possint. Fideicommissum et ante heredis insti-  
tutionem et post mortem heredis et codicillis etiam non con-  
firmatis testamento dari potest, licet [*ita*]<sup>1</sup> legari non possit.  
9 Item Graece fideicommissum scriptum ualeat, licet legatum  
10 Graece scriptum non ualeat. Filio qui in potestate est  
seruoue heredibus institutis, seu si his<sup>1</sup> legatum sit, patris uel  
domini fideicommitteri potest, quamuis ab eo legari non possit.

- 2 from the fact that so he willed who bequeathed it. The  
words usually employed in *fideicommissa* are these: 'I com-  
mit to your good faith to give,' 'I ask you to give,' 'I wish to  
3 be given,' and such like. And it has been held in practice  
that a fideicommissary gift may be left even by a mere nod.  
4 Those can bequeath a trust-gift who can make a testament,  
though they may not have made one; for a man who is about  
5 to die intestate may yet leave a *fideicommissum*. The same  
things can be left by it that can be legated by damnation.  
6 It can be given to those to whom a legacy can be bequeathed.  
7 A Junian latin can take it, though unable to take a legacy.  
8 It may be bequeathed before the heir's institution, or after his  
death, or even in a codicil unconfirmed by testament; although  
9 in none of those ways can a legacy be left. It is valid  
though written in Greek; whereas a legacy in that language  
10 is invalid. If a son *in postestate* or a slave be instituted  
heir, or if a legacy be left them, a *fideicommissum* may be  
imposed on father or owner, though a legacy cannot so be

§ 2. Comp. Gai. ii, 249; Paul. iv, 1,  
§§ 5, 6.

§ 3. Instead of *usu* the MS. has *in  
usu*.

§ 4. Comp. Vlp. in fr. 2, D. *de legat.*  
I. (xxx); Gai. ii, 270.

§ 5. Comp. xxiv, §§ 8, 25; Gai. ii,  
260-262.

§ 6. Comp. Gai. ii, §§ 285-287; above,  
xxii, 5; xxiv, 28.

<sup>1</sup> The MS. has *hi qui*.

§ 7. Comp. Gai. i, 24; ii, 275.

§ 8. Comp. Gai. ii, §§ 269, 270a, 277;  
above, xxiv, §§ 15, 16.

<sup>1</sup> *Ita* added by Hu., adopted by  
K., and approved by Bk.

§ 9. Comp. Gai. ii, 281.

§ 10. Comp. xxiv, 21.

<sup>1</sup> So the MS.; Boeck. suggests  
*sive iis*.

- 11 Qui testamento heres institutus est, codicillis etiam non confirmatis rogari potest uel<sup>1</sup> ut hereditatem totam uel ex parte alii restituat, quamuis directo heres institui ne quidem confirmatis codicillis possit. Fideicommissa non per formulam petuntur, ut legata, sed cognitio est Romae quidem consulum aut praetoris qui *fideicommissarius*<sup>1</sup> uocatur; in prouinciis uero praesidium prouinciarum. Poenae causa uel incertae personae ne quidem fideicommissa dari possunt.
- 14 Is qui rogatus est alii restituere hereditatem, lege quidem Falcidia [*locum*]<sup>1</sup> non habente, quoniam non plus puta quam dodrantem restituere rogatus est, ex Trebelliano senatusconsulto restituit, ut ei et in eum dentur actiones cui restituta est hereditas: lege autem Falcidia interueniente, quoniam plus dodrantem uel etiam totam hereditatem restituere rogatus sit, ex Pegasiano<sup>2</sup> senatusconsulto restituit, ut, deducta parte

- 11 charged upon him. He who is instituted heir in a testament can be asked in a codicil, even though it be not confirmed by the testament, to restore the inheritance in whole or in part to some other person; whereas a man cannot be directly instituted heir in a codicil, notwithstanding it may have been confirmed by testament. *Fideicommissa* are not sued for by formula, like legacies; it is the consuls, or the praetor who is styled *praetor fideicommissarius*, that has cognisance of them in Rome, and in the provinces the provincial governors.
- 13 But not even *fideicommissa* can be given by way of penalty, or to an uncertain person.
- 14 He who is asked to restore an inheritance, if the Falcidian law does not come into operation because what he is asked to restore does not exceed three-fourths, does so under the provisions of the Trebellian senatusconsult, whereby actions [affecting the inheritance] are granted to or against the party to whom the inheritance is restored; if, however, the Falcidian law does come into play, because the heir has been asked to restore more than three-fourths, perhaps the whole, of the inheritance, restitution is made under the Pegasian senatusconsult, so that after the [Falcidian] fourth has been deducted, actions still continue to lie in favour of and against the in-

§ 11. Comp. Gai. ii, 273; above, § 8.

<sup>1</sup> Vahl. and K. omit this *uel*.

§ 12. Comp. Gai. ii, 278.

<sup>1</sup> In the ms. *fideicommisso*.

§ 13. Comp. xxiv, §§ 17, 18; Gai. ii, §§ 287, 288.

§ 14. Comp. Gai. ii, §§ 253-257.

<sup>1</sup> Added by Du Tillet, and accepted by all eds.

<sup>2</sup> The ms. has *Pccatiano* both here and in § 15; in § 16, *Pegatiano*.



- quarta, ipsi qui scriptus est heres [et]<sup>3</sup> in ipsum actiones conseruentur, is autem qui recipit hereditatem legatarii loco  
 15 habeatur. Ex Pegasiano senatusconsulto restituta hereditate, comoda et incommoda hereditatis communicantur inter heredem et eum cui reliquae partes restitutae sunt, interpositis stipulationibus ad exemplum partis et pro parte stipulationum. partis autem et pro parte stipulationes proprie dicuntur quae de lucro et damno communicando solent interponi inter heredem et legatarium partiarium, id  
 16 est cum quo partitus est heres. Si heres damnosam hereditatem dicat, cogitur a praetore adire et restituere totam, ita ut ei et in eum qui recipit hereditatem actiones dentur, proinde atque si ex Trebelliano senatusconsulto restituta fuisset. idque ut ita fiat Pegasiano senatusconsulto cautum.  
 17 Si quis in fraudem<sup>1</sup> tacitam fidem accommodauerit ut non capienti<sup>2</sup> fideicommissum restituat, nec quadrantem eum

- stituted heir himself, while he to whom the inheritance is  
 15 restored is dealt with as a legatee. On restitution of an inheritance under the Pegasian senatusconsult, its advantages and disadvantages are shared between the heir and the party to whom the residue has been restored, stipulations being interchanged after the model of those known as *stipulationes partis et pro parte*. Those stipulations are properly so called which are interchanged, for the purpose of securing a fair division of gain and loss, between an heir and a partuary legatee, *i.e.* a legatee with whom the heir has shared the inheritance.  
 16 If an heir declare that an inheritance will prove a source of loss to him, he is compelled by the praetor to enter and to restore the whole of it; and then actions proceed at the instance of or against him who has received it, as if the restitution had been made under the Trebellian senatusconsult. The Pegasian senatusconsult provides expressly that this course shall be followed.  
 17 If any one have fraudulently given a secret promise to restore as *fideicommissum* to a person who has not the *ius capiendi*,

<sup>3</sup> Added by Hugo, and adopted by all later eds.

§ 15. Comp. Gai. ii, §§ 254, 257, and note 1; above, xxiv, 15.

§ 16. Comp. Gai. ii, 258.

§ 17. Comp. fr. 11, D. *de his q. ut indign.* (xxxiv, 9); fr. 59, § 1, D. *ad L. Falcid.* (xxxv, 2); fr. 48, pr., fr. 49, D. *de iure fisci* (xlix, 14).

<sup>1</sup> *I.e. in fraudem legis.*

<sup>2</sup> Say to an unmarried or a childless person, xxii, 3. A Junian latin might take a *fideicommissum* bequeathed openly on the face of the testament, § 7; but it is doubtful whether he could take under a secret and undisclosed trust.

deducere senatus censuit<sup>3</sup> nec caducum vindicare ex eo testamento si liberos habeat.<sup>4</sup>

18 Libertas dari potest per fideicommissum.

[XXVI. DE LEGITIMIS HEREDIBVS.]

1 Intestatorum<sup>1</sup> ingenuorum hereditates pertinent primum ad suos heredes, id est liberos qui in potestate sunt ceterosque qui liberorum loco sunt :<sup>2</sup> si sui heredes non sunt, ad consanguineos, id est fratres et sorores ex eodem patre : si nec hi sunt, ad reliquos agnatos proximos, id est cognatos<sup>3</sup> uirilis sexus per mares descendentes eiusdem familiae.<sup>4</sup> id enim cautum est lege duodecim tabularum hac : ' si intestato moritur, cui suus heres nec [*escit*], agnatus proximus familiam<sup>5</sup> habeto.'<sup>6</sup>

the senate has decreed that he shall not be entitled to deduct his fourth, nor yet, supposing him to have children, to vindicate gifts under the testament that have become caducous.

18 Freedom may be conferred by *fideicommissum*.

[XXVI. OF HEIRS-AT-LAW.]

1 The inheritances of intestates of free-birth belong in the first place to their *sui heredes*, i.e. their children in potestate and other persons who are in the position of children ; if there be no *sui heredes*, then to their consanguineans, i.e. their brothers and sisters by the same father ; if these fail, then to the other nearest agnates, i.e. kinsmen of the male sex, descended through males, and members of the same family. For so it is provided in this law of the Twelve Tables : ' If a man die intestate, to whom there is no *suus heres*, let his nearest agnate take his patrimony.'

<sup>3</sup> By a *senatusconsultum Plancianum*, not later probably than the time of Hadrian ; for, by a rescript of Antoninus Pius, the fourth thus forfeited by the heir fell to the fisc, fr. 59, § 1, D. *ad L. Falc.* (xxxv, 2).

<sup>4</sup> Comp. Gai. ii, §§ 206, 207.

§ 18. Comp. ii, 7.

TIT. XXVI, § 1. Reproduced in *Collat.* xvi, 4, § 1. Comp. Gai. iii, §§ 1-5, 9-11.

<sup>1</sup> In *Collat.* it is *gentiliciorum*.

<sup>2</sup> For example, a wife in *manu*, who was *filiae loco*.

<sup>3</sup> The words *proximos* i.e. *cognatos* are omitted in *Collat.*

<sup>4</sup> See xi, 3, and note 2.

<sup>5</sup> See Gai. ii, 102.

<sup>6</sup> After this par. Hu. and K. introduce from *Collat.*, as § 1a,—*Si agnatus defuncti non sit, eadem lex duodecim tabularum gentiles ad hereditatem uocat his uerbis : ' si agnatus nec escit, gentiles familiam habento.' nunc nec gentiles nec gentilicia iura in usu sunt.* But there can be no doubt this passage was purposely omitted by the abridger as mere matter of history.

- 2 Si *defuncti unus*<sup>1</sup> sit filius, ex altero filio *iam mortuo*<sup>2</sup> nepos unus uel etiam plures, ad omnes hereditas pertinet; non ut in capita diuidatur sed in stirpes, id est ut filius solus mediam partem habeat et nepotes quotquot sunt alteram dimidiam: aequum est enim nepotes in patris sui locum succedere, et eam partem habere quam pater eorum si uiueret habiturus esset.
- 3 Quamdiu suus heres speratur heres fieri posse, tamdiu locus agnatis non est; uelut si uxor defuncti praegnans sit aut filius apud hostes sit.
- 4 Agnatorum hereditates diuiduntur in capita; uelut si sit fratris filius et alterius fratris duo pluresue liberi, quotquot sunt ab utraque parte personae, tot fiunt portiones, ut singuli singulas capiant.
- 5 Si plures eodem gradu sint agnati, et quidam eorum here-

2 If a man deceased leave one son, and one or more grandchildren by another son who has predeceased him, the inheritance belongs to all of them. They take, however, not as individuals, but as branches [of the parent tree]; that is to say the son who stands alone will take one half, and the grandchildren, whatever their number, the other half. For it is but fair that the grandchildren should succeed to the place their father held, and have the share to which he would have been entitled had he survived.

3 So long as there is hope that a *suius heres* may become heir, there is no room for the agnates; as when the widow of the deceased is pregnant, or his son in the hands of an enemy.

4 The inheritances of agnates are divided *per capita* [*i.e.* according to the number of individuals entitled]; for example if there be [one] son of [one deceased] brother, and two or more children of another brother [also deceased], whatever be the number of persons in the two branches together, the inheritance is divided into just so many portions, so that each may take one.

5 If there be several agnates of the same degree, and some of

§ 2. Comp. Gai. iii, §§ 7, 8; *Collat.* xvi, 4, § 9.

<sup>1</sup> So Cann. and L. and most later eds.; Hu. and K., following Cuj., have simply *defuncti*; the ms. has *defunctus*.

<sup>2</sup> So Arndts; the ms. and many eds. have *mortuo iam*; L., Bk., and Vahl. *mortuo item*.

§ 3. Comp. Gai. iii, 13; § 7, I. *de her. q. ab int.* (iii, 1); § 6, I. *de leg. agn. succ.* (iii, 2).

§ 4. Comp. Gai. iii, 16.

§ 5. Comp. Gai. iii, §§ 12, 22; fr. 9, D. *de suis et leg.* (xxxviii, 16); § 4, I. *de SC. Orph.* (iii, 4); § 7, I. *de leg. agn. succ.* (iii, 2).

ditatem ad se pertinere noluerint, uel antequam adierint decesserint, eorum pars aderescit his qui adierint; quod si nemo eorum adierit, ad insequentem gradum ex lege hereditas non transmittitur, quoniam in legitimis hereditatibus successio non est.

6 Ad feminas ultra consanguineorum gradum legitima hereditas non pertinet; itaque soror fratri sororiue legitima heres fit.<sup>1</sup>

7 Ad liberos matris intestatae hereditas ex lege duodecim tabularum non pertinebat, quia feminae suos heredes non habent; sed postea imperatorum Antonini et Commodi oratione in senatu recitata id actum est, ut sine in manum conuentione<sup>1</sup> matrum legitimae hereditates ad filios pertineant,

8 exclusis consanguineis et reliquis agnatis. Intestati filii hereditas ad matrem ex lege duodecim tabularum non perti-

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them have declined the inheritance or died before entry, their shares accresce to those who have entered; but if none of them have entered, the inheritance is not transmitted by the statute to those of the next degree, for in the inheritances of the Twelve Tables there is no succession [of degrees].

6 An inheritance-at-law does not belong to women [related] beyond the consanguinean degree; therefore [while] a sister becomes heir-at-law of her brother or sister, [*a father's sister, a brother's daughter, and so on, does not*].

7 According to the Twelve Tables the inheritance of a mother dying intestate did not belong to her children, because women have no *sui heredes*; but afterwards, in pursuance of an Oration in the senate by the emperors Marcus Aurelius and Commodus, it was enacted that, even without *in manum conuentio*, the inheritances of mothers should belong to their children, to the exclusion of consanguinean and other agnates.

8 The inheritance of a son dying intestate does not belong to his mother by the law of the Twelve Tables; but by the Ter-

§ 6. Comp. Gai. iii, §§ 14, 23; *Collat.* xvi, 3.

<sup>1</sup> Hu., following Gai. iii, 14, thinks there is here a homeoteleutic omission, and adds—*amita uero uel fratris filia et deinceps legitima heres non fit.*

§ 7. Comp. pr. I. *de SC. Orph.* (iii, 4). In Gai. iii, 24, this Sct. is not mentioned. It was the outcome of the oration referred to in the text; enacted in the year 178, and consu-

late of Julianus Rufus and Gavius Orphitus.

<sup>1</sup> Before this Sct. children had a right of succession to their mother if she had been *in manu* of their father; for in that case mother and children were related as agnates.

§ 8. Comp. tit. I. *de SC. Tertull.* (iii, 3); Gai. iii, §§ 23, 24. It is thought that Gai. must have referred to this Sct. in an illegible page of the Verona ms.; see iii, § 33, note.



net; sed si ius liberorum habeat, ingenua trium, libertina quattuor, legitima heres fit ex senatusconsulto Tertulliano, si tamen ei filio neque suus heres sit quique inter suos heredes ad bonorum possessionem a praetore uocatur, neque pater ad quem lege hereditas bonorumue possessio cum re pertinet,<sup>1</sup> neque frater consanguineus: quod si soror consanguinea sit, ad utrasque pertinere iubetur hereditas.

[XXVII. DE LIBERTORVM SVCCESIONIBVS VEL BONIS.]

- 1 Libertorum intestatorum hereditas primum ad suos heredes pertinet; deinde ad eos quorum liberti sunt, uelut patronum
- 2 patronam liberosue patroni. Si sit patronus et alterius
- 3 patroni filius, ad solum patronum hereditas pertinet. Item
- 4 patroni filius patroni nepotibus obstat. Ad liberos patronorum hereditas defuncti pertinet, ita ut in capita non in stirpes diuidatur.

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tullian senatusconsult she becomes his heir-at-law if she have the privilege resulting from children, three in the case of a woman of free-birth, four in that of a freedwoman; provided always that her son is neither survived by a *suus heres*, nor by any person whom the praetor calls to possession of the estate along with *sui*, nor by his father if he be entitled either to the statutory inheritance or to effectual possession of the estate, nor by a consanguinean brother. But if there be a consanguinean sister surviving, it is ordained that the inheritance shall belong to her mother and her jointly.

[XXVII. OF THE SUCCESSIONS OR ESTATES OF FREEDMEN.]

- 1 The inheritance of a freedman dying intestate belongs in the first place to his *sui heredes*; then to the person whose freedman he is, as his patron, his patroness, or his patron's
- 2 children. If he be survived by a patron and the son of another patron, the inheritance belongs solely to the former.
- 3 A patron's son, too, excludes [another] patron's grandsons.
- 4 The inheritance of the deceased so belongs to his patron's children that it is divided *in capita* and not *in stirpes*.

<sup>1</sup> An adoptive father did not come within this limitation, fr. 2, § 15. D. ad SC. Tertull. (xxxviii, 17).

pr. D. de suis et legit. (xxxviii, 16); Collat. xvi, 8; Gai. iii, 40.

§§ 2, 3. Comp. Gai. iii, 60.

§ 4. Comp. Gai. iii, 61; Paul. iii, 2, § 3; § 3, I. de succ. lib. (iii, 7).

TIT. XXVII, § 1. Comp. Vlp. in fr. 3,

- 5 Legitimae hereditatis ius, quod ex lege duodecim tabularum descendit, capitis minutione amittitur.

## [XXVIII. DE POSSESSIONIBVS DANDIS.]

- 1 Bonorum possessio datur aut contra tabulas testamenti, aut *secundum*<sup>1</sup> tabulas, [aut] intestati.  
 2 Contra tabulas bonorum possessio datur liberis emancipatis<sup>1</sup> testamento praeteritis, licet legitimo [iure]<sup>2</sup> non ad eos pertineat hereditas. Bonorum possessio contra tabulas liberis tam naturalibus quam adoptiuis datur; sed naturalibus quidem emancipatis, non tamen et illis qui in adoptiua familia sunt; adoptiuis autem his tantum qui in potestate manserunt.  
 4 Emancipatis liberis ex edicto datur bonorum possessio, si

- 5 The right to an inheritance as heir-at-law, if it be derived from the Twelve Tables, is lost by *capitis deminutio*.

## [XXVIII. OF GRANTS OF POSSESSION.]

- 1 Possession of the estate of a party deceased is granted either in opposition to his testamentary writings, or in terms thereof, or on his intestacy.  
 2 *Bonorum possessio* in opposition to a testament is granted to emancipated children who have been passed over in it, although the inheritance does not belong to them under the *ius civile*.  
 3 It is granted both to natural and adoptive children; to the former if emancipated, but not if they have passed into an adoptive family; to the latter, however, only if they have  
 4 remained *in potestate* [of their adoptive parent]. It is granted by the edict to emancipated children if they are prepared to give security to their brothers who have continued

§ 5. Comp. Gai. iii, §§ 21, 27, 51; § 2, I. de SC. Orph. (iii, 4). The new *legitimae hereditates* of the imperial jurisprudence were not lost by *capitis minutio*.

TIT. XXVIII, § 1. Comp. Gai. ii, 119, note 1; Gai. iii, §§ 33, 34, and notes; pr. § 1, I. de bon. poss. (iii, 9).

<sup>1</sup> Here, as in xx, 14, the ms. has *aduersus* instead of *secundum*. As it omits the last *aut* there results the curious reading—*aduersus tabulas intestati*.

§ 2. Comp. Gai. ii, 135; above, xxii, 23; § 3, I. de bon. poss. (iii, 9).

<sup>1</sup> Hu. interpolates *uel* between *liberis* and *emancipatis*. But wrongly; for praeterition of a *suus* invalidated a will and caused intestacy, Gai. ii, 123.

<sup>2</sup> Added by L. Previous eds. omitted it, reading *legitima* instead of *legitimo* as in the ms.

§ 3. Comp. Vlp. in fr. 1, § 6, D. de b. p. c. t. (xxxvii, 4); §§ 9-12, I. de her. q. ab int. (iii, 1).

§ 4. Comp. Vlp. in Collat. xvi, 7, § 2; Gai. ii, 270; Paul. v, 9, § 4.

parati sunt cauere *fratribus*<sup>1</sup> suis, qui in potestate manserunt, bona quae moriente patre habuerunt se conlaturos.

- 5 Secundum tabulas bonorum possessio datur scriptis heredibus, scilicet si eorum quibus contra tabulas competit nemo sit, aut petere *nolint*. Etiam si iure civili non ualeat testamentum, forte quod familiae mancipatio uel nuncupatio defuit, si signatum testamentum sit non minus quam septem testium ciuium Romanorum signis, bonorum possessio datur.
- 7 Intestati datur bonorum possessio per septem gradus: primo gradu liberis; secundo legitimis heredibus; tertio proximis cognatis; quarto familiae patroni; [*quinto*] patrono patronae, item liberis, [*parentibus*]ue<sup>1</sup> patroni patronae; sexto uiro uxori; septimo cognatis manumissoris quibus per

*in potestate* that they will collate [*i.e.* bring into division] the estate belonging to them at their father's death.

- 5 *Bonorum possessio* in terms of a testament is given to the heirs named therein, if there be no person to whom possession in opposition to the deed is competent, or if all to whom it is
- 6 competent refrain from applying for it. Even though a testament may be invalid by the *ius civile*, say because of the omission of the *familiae mancipatio* or of the words of nuncupation, yet if it be sealed with the seals of not fewer than seven witnesses, Roman citizens, possession of the estate will be granted [in accordance with it].
- 7 *Bonorum possessio* upon intestacy is granted through seven degrees: in the first degree to children; in the second to the heirs-at-law [*i.e.* collateral agnates and patrons]; in the third to the nearest cognates; in the fourth to the family of the patron; in the fifth to the patron <sup>and</sup> or patroness ~~of a patron or patroness~~, (and the children) <sup>or</sup> of the former, as also to the parents, of a patron or patroness [~~manumitted e mancipio~~]; in the sixth to husband or wife; in the seventh to those cognates of a manumitter who are allowed by the Furian law to take

<sup>1</sup> The MS. has *patribus*, first corrected by Cuj.

§ 5. Comp. Vlp. in fr. 2, pr. D. *de b. p. s. t.* (xxxvii, 11); §§ 1, 3, I. *de bon. poss.* (iii, 9). The *peculium castrense uel quasi* was not required to be collated.

§ 6. Comp. xxiii, 6; Gai. ii, §§ 119, 149.

§ 7. Comp. § 1, I. *de bon. poss.* (iii, 9).

<sup>1</sup> See Vlp. in *Collat.* xvi, 9, § 1, on the strength of which Cuj. interpolated *parentibus*, the MS. having

*liberosue*. There has been much controversy about this fifth grant; and the difficulty is not cleared up, but on the contrary increased, by Just. in § 3, I. *de bonor. poss.* (iii, 9), and Theoph. in his Paraphrase. The meaning of *patrono patronae* is plain enough; it is the intermediate words that have proved to many unintelligible. The explanation in the translation is that suggested by Hu. in his *Studien*, pp. 58 f.

a *haren? manumissor*

See note p. 438,

- legem Furiam<sup>2</sup> plus mille asses capere licet: et si nemo sit ad quem bonorum possessio pertinere possit, aut sit quidem sed ius suum omiserit, populo bona deferuntur ex lege Iulia caducaria.<sup>3</sup> Liberis bonorum possessio datur, tam his qui in potestate usque in mortis tempus fuerunt quam emancipatis; item adoptiuis, non tamen etiam in adoptionem datis.
- 9 Proximi cognati bonorum possessionem accipiunt non solum per feminini sexus personam cognati sed etiam agnati capite deminuti: nam licet legitimum ius agnationis capitis minutione amiserint, natura tamen cognati manent.<sup>1</sup>
- 10 Bonorum possessio datur parentibus et liberis intra annum
- 11 ex quo petere potuerunt, ceteris intra centum dies. Qui omnes intra id tempus si non petierint bonorum possessionem, sequens gradus admittitur, perinde atque si superiores non essent; idque per septem gradus fit.
- 12 Hi quibus ex successorio edicto bonorum possessio datur

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more than a thousand *asses*. If there be no one entitled to the *bonorum possessio*, or if there be such an one but he have waived his right, the estate passes to the people in virtue of the Julian caducary law. The *bonorum possessio* 'to children' is granted not only to those who have remained *in potestate* down to the time of the parent's death, but also to those who have been emancipated; to adopted children too, but not to those given in adoption. Not only do those obtain it as 'nearest cognates' who are of kin through a female, but also agnates who have undergone *capitis deminutio*; for though they have thereby lost their civil right of agnation, by natural law they still continue kinsmen.

- 10 *Bonorum possessio* is granted to ascendants and descendants [at any time] within a year after it has become competent to them to apply for it; to other persons within a hundred days.
- 11 When all [those included in any particular degree] have failed to apply for it within the time limited, the next degree is admitted, just as if the preceding ones were non-existent; and this is the case through the seven degrees.
- 12 Those to whom *bonorum possessio* is granted by the edict

<sup>2</sup> Comp. i, 2; Gai. ii, 255, and notes.

<sup>3</sup> See Gai. i, 145, note 1.

§ 8. Comp. Gai. iii, 26; fr. 1, § 2, D. *quis ordo* (xxxviii, 15); fr. 1, § 6, fr. 4, fr. 5, D. *si tab. test.* (xxxviii, 6).

§ 9. Comp. Gai. iii, §§ 27, 30; tit. I. *de succ. cogn.* (iii, 5).

<sup>1</sup> Comp. Gai. i, 158.

§§ 10, 11. Comp. §§ 9, 10, I. *de bon. poss.* (iii, 9).

§ 12. Comp. Gai. iii, 32; iv, 34; § 2, I. *de bon. poss.* (iii, 9).



heredes quidem non sunt, sed heredis loco constituuntur beneficio praetoris. ideoque seu ipsi agant seu cum his agatur, ficticiis actionibus opus est, in quibus heredes esse finguntur.

- 13 Bonorum possessio *aut cum re datur*<sup>1</sup> aut sine re: cum re, [*cum*]<sup>2</sup> is qui accepit cum effectu bona retineat: sine re, cum alius iure civili euincere hereditatem possit; ueluti si suus heres in testa[*mento praeteritus sit, licet scriptis heredibus secundum tabulas bonorum possessio deferatur, erit tamen ea*]<sup>3</sup> bonorum possessio sine re, quoniam suus heres euincere hereditatem iure legitimo potest.

XXXX  
[XXVIII. DE BONIS LIBERTORVM.]

- 1 Cuius Romani liberti hereditatem lex duodecim tabularum patrono defert, si intestato sine suo herede libertus decesserit: ideoque siue testamento facto decedat, licet suus heres ei non

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regulating successions are not in truth heirs, but only established in the position of heirs by the beneficial intervention of the praetor. Therefore whether they are suing or being sued, fictitious actions must be employed, in which it is pretended that they are heirs.

- 13 *Bonorum possessio* is granted either *cum re* or *sine re*,—*cum re* when he to whom it is granted can effectively retain the *bona*; *sine re* when some other person can wrest the inheritance from him by aid of the *ius civile*. For example, if a *suus heres* [*have been passed over in a testament, although bonorum [possessio secundum tabulas be granted to the heirs instituted [therein, yet it will be] sine re, since the suus heres can wrest the inheritance from them in virtue of his statutory right.*

[XXIX. OF THE ESTATES OF FREEDMEN.]

- 1 The law of the Twelve Tables confers the inheritance of a Roman citizen freedman upon his patron, if the freedman die intestate without a *suus heres*; therefore if he die leaving a testament, though possibly not a *suus heres*, or intestate but

§ 13. Comp. Gai. ii, 148; iii, §§ 35–37; above, xxiii, 6; xxvi, 8.

<sup>1</sup> The ms. has *autem reidatur*.

<sup>2</sup> Added by Hugo.

<sup>3</sup> Interpolated by K. After *heres* the ms. has *intestati*. Bk. reads—*ueluti si [sit] suus heres, intestati*

*bonorum possessio sine re* [est], *quoniam*, etc. But Krueger's amendment is preferable.

TIT. XXIX, § 1. Comp. Schoell; *Tab.* v, 8; Gai. iii, §§ 39–42; above, tit. xxvii; tit. I. *de succ. libert.* (iii, 7).

sit, seu intestato, et suus heres ei sit *quamuis*<sup>1</sup> non naturalis, sed uxor puta quae in manu fuit uel adoptiuus filius, lex patrono nihil praestat. sed ex edicto praetoris, seu *testato*<sup>2</sup> libertus moriatur, ut aut nihil aut minus quam partem dimidiam bonorum patrono relinquat, contra tabulas testamenti partis dimidia bonorum possessio illi datur, nisi libertus aliquem ex naturalibus liberis successorem sibi relinquat; siue intestato decedat, et uxorem forte in manu uel adoptiuum filium relinquat, aequae partis mediae bonorum possessio contra suos heredes patrono datur.

- 2 In bonis libertae patrono nihil iuris ex edicto datur. itaque — — — — —<sup>1</sup> seu intestata moriatur liberta, semper ad eum hereditas pertinet licet liberi sint libertae, quoniam  
3 non sunt sui heredes matri [ut] *obstent*<sup>2</sup> patrono. Lex Papia Poppaea postea libertas quattuor liberorum iure tutela patronorum liberauit: et cum intulerit iam posse eas sine

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with a *suius heres*, though perhaps not a natural one but only a wife *in manu* say or an adopted son, the statute gives nothing to the patron. By the praetor's edict, however, if the freedman die testate, but leave his patron nothing, or less than the half of his estate, the patron gets possession of a half of the *bona* in opposition to the testament, unless the freedman have left one of his children by birth as his successor; if he die intestate, survived say by his wife *in manu* or an adopted son, possession of a half of his estate is in like manner granted to the patron as against [those artificial] *sui heredes*.

- 2 No right in the estate of a freedwoman is conferred by the edict on her patron. Therefore [*if she wish to make a testament, it is in the power of her patron to withhold his auctoritas [if he be not instituted in it as her heir]*]; if she die intestate, the inheritance must always belong to him, even if she leave children, seeing they are not their mother's *sui heredes*, and  
3 so cannot exclude the patron. The Papia-Poppaeian law afterwards liberated freedwomen from tutory in right of four children; and as it was a necessary result that they could thenceforth make testaments without the *auctoritas* of their

<sup>1</sup> So Bk.; the ms. has *quā*; Vahl., Hu., and K. *quamquam*.

<sup>2</sup> So Cuj. and the later eds.; the ms. has *testamento*; most earlier eds. *testamento facto*.

§ 2. Comp. Gai. iii, 43; i, 192.

<sup>1</sup> K. proposes to fill the lacuna

with such words as *seu testari uoluerit liberta, in patroni potestate erat ne testamento auctor fieret in quo ipse heres institutus non esset*, seu, etc.

<sup>2</sup> *Vt obstent* is due to L.; the ms. has *obstit*.

§ 3. Comp. Gai. iii, 44; i, 194.

auctoritate patronorum testari, prospexit ut pro numero liberorum libertae *superstitum*<sup>1</sup> uirilis pars patrono debeatur.  
 4 Liberi patroni uirilis sexus eadem iura in bonis libertorum  
 5 parentum suorum habent quae et ipse patronus. Feminae uero ex lege quidem duodecim tabularum perinde ius habent atque masculi patronorum liberi; contra tabulas autem testamenti liberti, aut ab intestato contra suos heredes non naturales, bonorum possessio eis non competit; sed si ius trium liberorum habuerunt etiam haec iura ex lege Papia  
 6 Poppaea nanciscuntur. Patronae *in*<sup>1</sup> bonis libertorum illud ius tantum *habebant*<sup>2</sup> quod lex duodecim tabularum introduxit; sed postea lex Papia [*ingenuae*]<sup>3</sup> patronae duobus liberis honoratae, libertinae tribus, id iuris dedit quod patronus  
 7 habet ex edicto. Item ingenuae trium liberorum iure honoratae eadem lex id ius dedit quod *ipsa*<sup>4</sup> patrono tribuit.

EXPLICIT.<sup>5</sup>

patrons, it provided that a share of a freedwoman's estate, proportionate to the number of her surviving children, should  
 4 in future be due to her patron. A patron's male children have the same right in the estates of his freedmen as he himself.  
 5 By the law of the Twelve Tables a patron's female descendants have the same rights as his male descendants; they are not entitled, however, [under the edict,] to *bonorum possessio* in opposition to the testament of a freedman, or, on his intestacy, as against his artificial *sui heredes*; but they acquire even this right by the Papia-Poppaeian law if they be mothers  
 6 of three children. Patronesses used to have no more right in the estates of their freedmen than was allowed by the Twelve Tables; but afterwards the Papia-Poppaeian law conferred upon a free-born patroness with two children, and a freedwoman patroness with three, the same rights that a patron  
 7 enjoys under the edict. The same statute further conferred upon a free-born patroness, privileged in respect of three children, the same rights that itself it conferred upon a patron.

## THE END.

<sup>1</sup> The MS. has *subprestitum*.

§ 4. Comp. Gai. iii, §§ 45, 46.

§ 5. Comp. Gai. iii, §§ 46, 47.

§§ 6, 7. Comp. Gai. iii, §§ 49, 50.

<sup>1</sup> The MS. has *ex*.<sup>2</sup> *Habeant* in the MS.<sup>3</sup> Added by Cuj. and adopted by all eds.<sup>4</sup> The MS. and all eds. have *ipsi*; *ipsa* seems more appropriate.<sup>5</sup> This is the end of the so-called 'Fragmenta.' But that Vlp., following Gai., proceeded to deal with obligations and actions is evident from the fact that in the *Collatio*, ii, 2, we have a passage from the *Regulae* on the subject of *iniuria*, and in fr. 25, D. *de O. et A.* (xlv, 7) another containing an enumeration of the leading varieties of actions.

## ADDITIONS AND CORRECTIONS.

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P. 11. Delete first note to § 29, substituting as follows:—‘Vlp. iii, 3, and Fr. Dos. § 7, attribute this provision to the Junian law; and Gai. in i, 80 speaks of it as introduced by the *lex Aelia Sentia et Iunia*, as if the Junian law were an amended version of the earlier enactment. Probably this to some extent is right. The Junian law seems to have done more than merely give a name to and define the position of those who, through non-observance in their manumission of the requirements of the *ius civile* and the Aelia-Sentian law, were not citizens, but still *de iure* slaves though *de facto* free, Gai. iii, 56. The Ael.-Sent. law had given the benefit of *causae probatio* to those *de facto* freemen whose want of citizenship was due to the fact that they were under thirty when manumitted, and that their manumission had not been *uindicta* on cause approved by the council, but either without such approval, or *censu* or *testamento*, comp. § 29 with §§ 17, 18, Vlp. i, 12. The Junian law seems to have extended the remedy to slaves under thirty at manumission who had been manumitted neither *uindicta*, *censu*, nor *testamento*, but informally, Gai. i, 41, iii, 56, Vlp. i, 10, iii, 3, or by a bonitarian owner, Vlp. i, 16. But it required the Sct. referred to in Gai. i, 31, Vlp. iii, 4, to extend it to slaves manumitted informally or by a bonitarian owner after the age of thirty.’

Pp. 14 and 15. Delete the first four and a half lines (‘Finally . . . informally’) of the conjectural translation of § 35, and substitute:—‘Finally, those who are latins because, being under thirty at manumission, they were manumitted otherwise than *uindicta* with sanction of the council, may become citizens by iteration or renewal of the manumission by their quiritarian owner, and that immediately if the renewal be in the manner required by the Aelia-Sentian law,—after they have passed thirty if the iteration be *uindicta* (without the necessity of the council’s approval), or *censu*, or *testamento*; those who are latins because, when over thirty, they were



manumitted neither *uindicta*, *censu*, nor *testamento*, but informally, may become citizens by iteration by their quiritarian owner in one of those three ways; while,' etc.

P. 20, second line of translation, before 'from that,' insert—'if we know who they are.'

P. 23, in translation, fourth line from foot, for 'in like manner,' read 'therefore.'

P. 39, after 'they be,' at end of sixth line of translation, insert—'to take the position of.'

P. 40, note to § 104, for 'Vlp. viii, 1,' read—'Vlp. viii, 8a.'

P. 41, § 111, note 3, for 'usucaption,' read 'usucapion.'

65 P. ~~ββ~~, first line of translation, for 'But the tutory of Junian latins under puberty, whether male or female,' read—'But the tutory of Junian latin freedwomen, and of latin freedmen under puberty.'

P. 75, fourth line of translation, for 'adolescent minors,' read 'persons in curatory.'

P. 120, § 134, note 1, fifth line from end, for 'It was enacted probably,' read—'It is generally supposed to have been enacted,' and at end of note add—'But as senatusconsults had by that time taken the place of *leges*, it probably was of earlier date.'

P. 133, in first line of translation of § 168, for 'without cretion,' read 'with cretion.'

P. 145, in fourth line of continuation of note 1 to § 201, before '*damnatus*,' insert '*damnas* or.'

P. 172, to note 3 to § 286, add—'It is possible that *Pegasiano* is a mistake for *Planciano*, see Vlp. xxv, 17, n. 3, and that it is the same Sct. as referred to in § 285.'

P. 175, in translation, eighth line from foot, delete 'of error.'

P. 204, in note to § 81, for 'iii, 12, pr.' read—'Th. iii. 12, pr.'

P. 250, second line of translation of § 190, for 'twofold restitution,' read 'a twofold penalty.'

P. 268, first line of translation of § 5, for 'while those in which,' read—'while those *in personam* in which.'

P. 269, fourth line from foot of second col. of notes, for '*cassio*,' read '*cessio*.'

- P. 271, at the end of note 2 to § 13, add—‘which the phrase *poena sacramenti*, § 14, tends to confirm.’
- P. 290, fourth line, first col. of notes, after ‘lands,’ insert—‘Paul. *ad Ed.* in fr. 6, D. *de R. V.* (vi, 1).’
- P. 302, to note to § 61, add—‘By a rescript of Marc. Aurelius compensation was allowed to be pleaded in answer to *stricti iuris* actions, under cover of an *exceptio doli*, § 30, tit. I. *afd.* This rescript may have been published before Gai. wrote, yet not have come to his knowledge.’
- P. 311, in middle of note 2 to § 80, after ‘contract and delict,’ insert—‘and is used in the words of the edict, fr. 2, § 1, D. *de cap. min.* (iv, 5).’
- P. 318, sixth line of translation, for ‘action in which the behaviour of a married woman,’ read—‘*actio rei uxoriae* when the wife’s conduct.’
- P. 321, first line of translation, for ‘it was impossible for the pursuer *ipso iure* to sue again,’ read—‘it was *ipso iure* impossible,’ etc.
- Pp. 334, 335, for ‘has arrived,’ once in § 136 and twice in § 137, read ‘is past.’
- P. 338, last line of translation of § 150, for ‘edict,’ read ‘respective interdicts.’
- P. 339, add to note to § 152—‘The interdict was a praetorian remedy, and the praetor dealt only with what had happened during his own year of office, which (Momms. in *M. u. M. Roem. Alt.* i, 493), from the year 601 | 153 downwards, began on 1st January.’
- P. 341, second last line of text, for ‘*prohibitorium*,’ read ‘*prohibitoriorum*.’
- P. 344, last line of translation, delete ‘and restipulation.’
- P. 345, middle of note to § 166, after ‘*uis ex conuentu*,’ insert—‘*uis moribus facta*, (Cic. *pro Caec.* i, 2, viii, 22).’
- P. 384, add to note 2 to § 17—‘Probably it was lawful only in tutory of women, and there allowed to a testamentary tutor on the same principle (noticed in Gai. i, 168) that was held to justify cession by a tutor-at-law.’
- P. 392, add, as a note to the words ‘*item si cognati inter se coierint*

usque ad sextum gradum,' on fifth line of text—'Fr. Vat. §§ 216-219, show that relationship to a testator within the sixth degree inclusive gave both *caelibes* and *orbi* a general exemption from the caducuary penalties of the Julian law; see also § 158.'

- P. 394, add to note to xvii, § 2—'It is a moot point whether Caracalla's enactment merely transferred *caduca* from the *aerarium* to the fisc, *i.e.* from the state to the emperor, or abolished in favour of the *aerarium* or the fisc—for the words are sometimes used indiscriminately—the prior right given by the Julian law to heirs and legatees who had children, Gai. ii, 207, 286. Taken in connection with another statement of Ulpian's, (*Collat.* xvi, 9, § 3), that Caracalla very greatly restricted the right of succession *ab intestato*, obviously in order to increase the influx to the fisc of *bona vacantia*, the latter view appears the more probable.'
- P. 395, in note to tit. xviii, for 'see note to xvii, 2,' read—'see note 3 to i, 21.'
- P. 412, last line of translation, for 'deceased or emancipated son,' read—'son who has died or been emancipated.'
- P. 429, in fifth last line of translation, after 'former,' insert 'even.'
- P. 430, in second last line of text, insert a comma after *liberis*, and for '[*parentibus*]ue,' read '[*parenti*]ue.' In fourth last line of translation, fifth, fourth, and third lines from foot, instead of 'in the fifth . . . *e mancipio*,' read—'in the fifth to the patron and patroness (and their children), as also to the *parens manumissor*, of a patron or patroness.'
- P. 430, in first line, second col., of note 1 to § 7, after '*liberosue*,' add—'but as there could be only one *parens manumissor*, it is proper to read *parenti* rather than *parentibus*.' At end of same note add—'He however retains the *parentibus* of Cujas.'

ALPHABETICAL DIGEST

OF THE MATTERS CONTAINED IN THE

TEXT AND NOTES,

AND OF SERVICE AS AN

INDEX.





## DIGEST.

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ABDICATION, *abdicatio*, of a testamentary tutor, U. xi, 17 and n. 2.

ABROGATIO LEGIS, U. i, 3.

ABSTINENDI POTESTAS, (see *Hereditas*, 3, 4), power to hold aloof from an inheritance allowed by the praetor to *sui heredes* (which see), G. ii, 158, U. xxii, 24; to *quasi-sui*, G. ii, 159; to a person *in causa mancipii* instituted heir with freedom (see *Mancipii*, etc.), 160; but not to slaves instituted as *heredes necessarii* (see *Necess. heredes*), 153, U. xxii, 24. If a party entitled to abstain had once intromitted with the inheritance, abstention became impossible, unless, being a minor, he obtained *in integrum restitutio* (which see), G. ii, 163. Abstention did not deprive him, however, of his rights of patronage over and succession to his parent's freedmen, G. iii, 67.

ACCEPTILATION, (see *Obligation*, 3), a verbal mode of discharging an obligation without actual payment, G. iii, 169; see style, *ibid.* It was applicable only to obligations created *verbis*, 170, (see *Verbal obligations*); but others might by novation (which see) be embodied in a stipulation and then thus discharged, 171. It was incompetent to a woman unless with her tutor's *auctoritas*, G. ii, 85, iii, 171. If an *adstipulator* granted such a discharge in fraud of the stipulant, he was liable in an action under the Aquilian law, G. iii, 215, the condemnation being *in duplum*, (see *Cretio litis infitiatione*), 216, iv, 171. Whether a debt could be partially acceptilated was matter of dispute, G. iii, 172.

ACCESSIO TEMPORIS, reckoning the possession of the author as an adjunct to that of the successor, G. iv, 151; see *Interdicts*, 8.

ACCESSION as a mode of acquiring property, see *Property*, 4, 6.

ACCESSORY RIGHTS, see *Principal and Accessory*.

ACCIDENT created no responsibility, G. iii, 211 and n. 1.

ACCRETION, see *Adcretio*.

ACTIONS, see *passim* Book iv of Gaius, which deals with *jus quod ad actiones pertinet*, G. i, 8.

### I. ACTIONS GENERALLY, AND THEIR CLASSIFICATIONS.

1. *Actio and judicium*.—*Actio* sometimes meant the right to

ACTIONS—*continued*.I. ACTIONS GENERALLY, AND THEIR CLASSIFICATIONS—*continued*.

- raise a particular action, G. iii, 161, or the liability to have to answer to it, G. iv, 4; but usually it meant the process itself, G. iv, 2, 3. In this sense *actio* and *judicium* were often used indiscriminately, as *mandati actionem habere*, G. iii, 161, *mandati judicium habere*, G. iii, 127; strictly speaking, *judicium* was the action when remitted to a *judex*, G. iv, 103, note 1.
2. *Actions civil and praetorian*.—Actions were either civil or praetorian according as they had been introduced by the *jus civile* or by the praetor in the exercise of his jurisdiction, G. iv, 110; for the edict was one of their most prolific sources, G. iv, 11.
3. *Actions in rem and in personam*.—As regards form, their most important distinction was that they were either *in rem* or *in personam*, G. iv, 1. In the former the pursuer averred either that a thing was his, or that he had a usufruct or servitude over another's property, or that his own property was free from such burdens, G. iv, 3, without mention in his averment of any person as disputing his right, G. iv, 87; so it was, at least, if he was suing *per formulam petitoriam*, and not by the unusual *actio per sponsionem*, which was in form one *in personam*, G. iv, 91, 93, (see *In rem actio per sponsionem*). In an action *in personam* the pursuer's averment was that the defender was indebted to him and bound *dare, facere, or praestare*, G. iv, 2; words defined in note 3. Those founded on *dare* or *dare facere* were technically *condictiones*, G. iv, 5, (see *Condictio*); while actions *in rem* with a petitory formula were called vindications, *ibid.*, (see *Vindicatio*).
4. *Actions petitory, penal, divisory, and prejudicial*.—An action was petitory when the pursuer claimed a thing as his or as due to him under a contract or other lawful deed, G. iv, 7; penal, when he claimed a penalty, for theft say or assault, 8; both petitory and penal, when the claim was originally on contract or other lawful deed, but the defender's liability augmented because of his denial of it, (see *Cretio litis infitiatione*), 9, 171. The divisory actions were the *a. familiae erciscundae* for partitioning an inheritance, *communi dividundo* for dividing common property, and *finium regundorum* for settling boundaries, G. iv, 42. Prejudicial were intended merely to settle a question of right or fact, without any immediate practical result, G. iii, 123, iv, 44.

ACTIONS—*continued*.I. ACTIONS GENERALLY, AND THEIR CLASSIFICATIONS—*continued*.

5. Actiones in jus *and* in factum conceptae.—This distinction was based on the structure of the *formula*, and the actions so called according as the pursuer founded on a right competent to him at law, or merely averred that something had been done or omitted by the defender which under the edict gave him a claim against the latter, G. iv, 45, 46; see *Formula*, 3.
6. Actiones utiles *and* in factum.—Those actions were called *utiles* which, being inapplicable to particular persons or cases as originally formulated by the *jus civile* or published in the album, the praetor rendered serviceable to them, by alteration of the phraseology or otherwise, when they were within the spirit though not the letter of the remedy, G. ii, 78 and n. 1, 253, iii, 202, 219; they were sometimes called *fictitiae*, where the adaptation was by introduction of a fiction (see *Fiction*), G. iv, 34–38, U. xxviii, 12. The *utiles actiones* of frequent occurrence became stereotyped, and took their place in the edict, G. ii, 253; when a case occurred which none of them exactly fitted, then, if the principle which underlay it was the same, the praetor constructed a special *formula* to meet the particular facts, which got the name of *actio in factum*, G. ii, 78, note 1.
7. Actions competent to and against heirs, and adjectician and noxal actions.—Actions *ex contractu* were usually competent to or against heirs; but the heir of an adstipulator (see *Adstipulation*) could not sue, and the heirs of sponsors and fideipromissors (see *Verbal obligations*) could not be sued, G. iv, 113. Penal actions *ex delicto* were not competent against the heirs of the delinquent, but, with exception of the *a. injuriarum*, were competent to those of the injured party, 112; in those that against the original debtor would have been both penal and petitory, heirs were not liable in penalties, 172. Actions *adjecticiae qualitatis* were those against *patresfamilia* in respect of the obligations *ex contractu* of *filiifamilias* and slaves, G. iv, 69–74a, (see *Adjectician actions*); noxal, those competent in respect of their delicts, 75–79, (see *Noxal actions*).
8. Stricti juris, bonae fidei, and arbitrariae actiones.—In some *judicia* the judge was authorised to decide according to general principles of good faith, *ex aequo et bono*, without holding himself fettered by the actual engagements of parties; these were called *bonae fidei judicia*, G. iv, 62, (see *Bonae fidei jud.*): all others were *stricti juris*, (though



ACTIONS—*continued*.I. ACTIONS GENERALLY, AND THEIR CLASSIFICATIONS—*continued*.

the phrase is not in Gaius.) Those were *arbitrariae* in which the judge had power, before proceeding to condemn the defender,—for the condemnation could only be in money, G. iv, 48, which possibly the pursuer did not want,—to ordain him to do what he thought right, say to deliver what was claimed in the action; if the order was complied with proceedings went no further, and condemnation was avoided, G. iv, 114, note.

9. *Actions perpetual and temporary*.—Actions were perpetual or temporary in two different senses. The right of action was perpetual in the case of those introduced by statute, whereas in those derived from the praetor's jurisdiction, with exception of a few modelled after others of the *jus civile*, it endured only for a year, G. iv, 110, 111. The action itself, if the *judicium* was *legitimum*, expired in eighteen months, while if *imperio continens* it came to an end with the demission of office by the magistrate who granted it, (see *Jud. leg. and imp. cont.*), 104, 105. (For other branches of the *jus quod ad actiones pertinet*, see, in addition to references above, *Procedure*, *Legis actiones*, *Formula*, *Litis contestatio*, etc.)

II. SPECIAL ACTIONS.—(See also *Condictio*, *Vindicatio*.)

*A. ad exhibendum*, G. iv, 51.

*A. arborum furtim caesarum*, G. iv, 11.

*A. certae creditae pecuniae*, G. iv, 13; it involved penal spon-  
sion and restipulation of a third part of the sum claimed,  
which went by way of penalty to him who was success-  
ful, G. iv, 171, 180; see *Sponsio et restipulatio*.

*A. commodati*, competent to a lender, G. iv, 47; it might be  
either *in jus* or *in factum concepta*, *ibid.*, and in the  
former case was *bonae fidei*, G. iv, 62; see *Commodate*.

*A. communi dividundo*, for dividing common property, G. iv,  
42, 44, note; it was *bonae fidei*, G. iv, 62, and entitled  
the judge to proceed to adjudication, G. iv, 42, U. xix, 16.

*A. conducti*, competent to a lessee or hirer against his lessor;  
was also *bonae fidei*, G. iv, 62; see *Location*.

*A. damni injuriae ex lege Aquilia*, G. iii, 210, iv, 9; see *Wrong-  
ful damage to property*.

*A. depensi*, introduced by the Publilian law in favour of a  
sponsor paying for the original debtor, competent if he  
was not reimbursed within six months, and *in duplum*,  
G. iii, 127, iv, 9, 22, 171. Under the system of the *legis  
actiones* the procedure was by *manus injectio pro judicato*  
(see *Legis actiones*, 5), G. iv, 22; consequently under the

ACTIONS—*continued*.II. SPECIAL ACTIONS—*continued*.

formular system the defender was required to give *cautio judicatum solvi*, (see *Cautiones*, etc.), G. iv, 25, 102. See *Suretyship*, 5.

- A. *depositi*, competent to a depositor, G. iii, 207. It might be either *in jus* or *in factum concepta*, G. iv, 47, in the former case being *bonae fidei*, 62; and condemnation entailed infamy on the defender, G. iv, 60, 182. See *Deposit*.
- A. *de peculio et de in rem verso*, G. iv, 73, 74a; see *Adjectician actions*, 3.
- A. *de pecunia constituta*, G. iv, 171; it involved penal sponson and restipulation of a sum equal to one-half of that claimed, 171, 180 compared with 94. See *Sponsio et restipulatio*.
- A. *empti*, competent to a purchaser; was *bonae fidei*, G. iv, 62. See *Sale*.
- A. *exercitoria*, one of the adjectician actions, G. iv, 71, 74; see *Exercitorian action*.
- A. *familiae erciscundae*, a *bonae fidei* action, G. iv, 62, for partitioning an inheritance, G. ii, 219, iv, 42, and empowering the judge to adjudicate to the heirs what he held each entitled to, *ibid.*, U. xix, 16. Nothing could be included in it that did not form part of the *hereditas*, G. ii, 220; but it was the proper action for claiming a legacy by preception (see *Legacy*, 28), G. ii, 219.
- A. *fiduciae*, a *bonae fidei* action, G. iv, 62, competent against him who failed to reconvey property transferred to him *ex facie* absolutely, but under trust to reconvey, G. ii, 59; condemnation rendered him infamous, G. iv, 182. See *Fiducia*.
- A. *finium regundorum*, for defining boundaries, also entitling the judge to adjudicate, G. iv, 42, U. xix, 16.
- A. *furti*, G. iii, 203–207; iv, 8, 37, 111, 112; condemnation, or even compromise, rendered the defender infamous, G. iv, 182. See *Theft*, 6.
- A. *furti concepti*, G. iii, 186, 191; see *Theft*, 4, 5.
- A. *furti oblati*, G. iii, 187, 191; see *Theft*, 4, 5.
- A. *furti prohibiti*, G. iii, 188, 192 and n. 2; see *Theft*, 4, 5.
- A. *injuriarum*, G. iii, 224, iv, 8; it was not competent to the heir of the injured party, G. iv, 112, and condemnation or compromise made the defender infamous, 182. See *Personal injury*.
- A. *institoria*, G. iv, 71, 74; see *Institorian action*.
- A. *judicati* was *in duplum*, G. iv, 9, 171. Under the system of the *legis actiones* the procedure was by *manus injectio*

ACTIONS—*continued*.II. SPECIAL ACTIONS—*continued*.

- (see *Legis actiones*, 5), G. iv, 21; consequently under the formular system the defender had to give *cautio judicatum solvi*, (see *Cautiones*, etc.), G. iv, 25, 102.
- A. mandati*, a *bonae fidei* action, G. iv, 62, competent either to mandant, G. iii, 111, 127, or mandatory, 156, 161; condemnation rendered the defender infamous, G. iv, 182. See *Mandate*.
- A. negatoria in rem*, that by which a man sought to have it declared that property of his was free from a usufruct, servitude, or other pretended burden, G. iv, 3 and n. 1.
- A. negotiorum gestorum*, G. iv, 33.
- A. praescriptis verbis*, which arose out of an innominate contract *do ut des*, etc., (see *Contract*, 1), G. iii, 89, note 1, was *bonae fidei*, G. iv, 162.
- A. pro socio*, for adjustment of partnership disputes, was *bonae fidei*, G. iv, 62; but condemnation in it entailed infamy, G. iv, 182. See *Partnership*.
- A. Publiciana*, G. iv, 36; see *Publician action*.
- A. quod jussu*, G. iv, 70, 74; see *Adjectician actions*, 1.
- A. rei uxoriae*, a *bonae fidei* action, G. iv, 62, for restitution of a dowry on the dissolution of a marriage, competent to the wife, her father and her jointly, her heirs, or the party from whom the dowry had come, according to circumstances, U. vi, 4-7. If the husband (or his heirs) defending impugned his wife's morals—and to prove immorality on her part entitled him to retain a part of the dowry, U. vi, 9, 12—he was required to give *cautio judicatum solvi* (see *Cautiones*, etc.), G. iv, 102. See *Dowry*, 7.
- A. rerum amotarum*, a less offensive name for an *actio furti* by a husband or his heirs, on the dissolution of a marriage by divorce or death, against the wife, and *vice versa*, U. vii, 2 and note; see *Husband and wife*, 6.
- A. Rutiliana*, one of the actions used by a *bonorum emptor* or purchaser of a bankrupt estate for enforcing claims against the bankrupt's debtors, G. iv, 35; see *Emptio bonorum*, 3.
- A. servi corrupti*, G. iii, 198; see *Slavery*, 9.
- A. Serviana*, the alternative action competent to a *bonorum emptor* against the bankrupt's debtors, and in which he pretended to be the bankrupt's heir, G. iv, 35; see *A. Rutiliana*, *Emptio bonorum*, 3.
- A. Serviana de rebus coloni*, that by which a landlord sought to recover effects of his farm tenant hypothecated for the rent, but which had passed into the hands of third parties, G. iv, 35, note 2.

ACTIONS—*continued*.II. SPECIAL ACTIONS—*continued*.

*A. tributoria*, G. iv, 72, 74a ; see *Adjectician actions*, 4.

*A. tutelae*, the action against a tutor, on his ward's attaining puberty, for accounting and payment, G. i, 191. It was *bonae fidei*, G. iv, 62 ; but condemnation in it rendered the tutor infamous, G. iv, 182. A woman, though in tutelage, had no such action when she was freed from it, G. i, 191. See *Tutory*, 9.

*A. venditi*, competent to a vendor, the counterpart of the *a. empti*, and like it *bonae fidei*, G. iv, 62 ; see *Sale*.

*A. vi bonorum raptorum*, G. iii, 209, at once penal and petitory, G. iv, 8 ; either condemnation or compromise rendered the defender infamous, G. iv, 182 ; see *Robbery*.

ACTOR and REUS, pursuer and defender, G. iv, 16, note 4, 57, 157, 159, 160.

ADCRETIO, accretion or accrual. Rights arose in this way in the following cases :—

1. *In intestate succession*.—Where there were several agnates of the same degree, and some declined the inheritance, their shares went by accretion to those who took, U. xxvi, 5 ; see *Hereditas*, 9.
2. *In testate succession*.—Under the old law when one of several testamentary heirs failed, his share went to the others *jure adcrescendi* ; but by the Julian law it was declared *caducous*, and was disposed of according to the caducuary rules it had introduced, U. xvii, 1, 2, i, 21 and n. 3, but with reservation of the old right to descendants and ascendants of the testator to the third degree, U. xviii. See *Julian and Papia-Poppaeian law*, 9, *Caducity*, 3, 5.
3. *In the case of praeterition*.—If a testator neither instituted nor disinherited sons who were *sui* his testament was useless, G. ii, 123 ; if other *sui*, such as a daughter or a grandchild, were passed over, the testament was valid, but they were entitled by accretion to share in the inheritance in certain proportions, according as the heirs instituted in the testament were *sui* or *extranei*, G. ii, 124, 126. See *Testament*, 10.
4. *In joint legacies*.—In the case of a joint legacy by vindication, if one of the legatees failed, his share accrued to the other, until the rule was modified by the Julian and Pap. Popp. law, G. ii, 199, 206, 207, U. xxiv, 12 ; see *Legacy*, 31, 34.
5. *Where a slave was manumitted by one only of several owners*.—In such a case if the manumission was irregular there was no result ; if regular, the slave did not become free,



ADCRETIO—*continued.*

but the manumitter's interest in him accrued to the other owners, U. i, 18; see *Manumission*, 2.

ADDICTIO BONORUM EMPTORI, G. iii, 79 and n. 7.

ADDICTUS and ADJUDICATUS, difference, G. iii, 189, 190, note 2.

ADEPTIO, revocation of a legacy or a testamentary gift of freedom, might be either in the testament itself or in a codicil confirmed by it, U. xxiv, 29, ii, 12; but in either case the same form had to be observed in the ademption as in the grant, *ibid.*, and note 1 to 29.

ADITIO HEREDITATIS, entering to an inheritance, see *Hereditas*, 5–7.

ADJECTICIAN ACTIONS, the so-called *actiones adjecticiae qualitatis*, praetorian actions against a *paterfamilias* in respect of debt contracted by a *filiusfamilias* or a slave, G. iv, 69–74.

1. *The actio quod jussu.*—If a *filiusfamilias* or a slave contracted debt on the authority of parent or owner, the praetor held the latter liable in full, on the ground that it was his credit that had in fact been relied on, G. iv, 70.
2. *Exercitorian and institorian actions.*—There was the same *in solidum* liability where a parent or owner had put his *filiusfamilias* or slave in charge of a vessel or of a shop or store, G. iv, 71; see *Exercitorian action*, *Institorian action*.
3. *The actio de peculio et de in rem verso.*—If a *filiusfamilias* or slave had a *peculium* (which see), then for any debts contracted, whatever the nature of them, the *paterfamilias* or owner was always liable to the extent of the *peculium*, G. iv, 73; he was entitled, however, to deduct from it the amount he had advanced towards it, and for which his *filiusfamilias* or slave was his debtor under a natural obligation (see *Obligation*, 5, 7), *ibid.* But if any part of the debt for which a creditor was suing had been contracted in procuring things which had been applied to the uses of the *paterfamilias* or owner, even without his authority, or by one who was in charge neither of a ship nor of a store, for that he was liable *in solidum*, *ibid.*; consequently, it was the practice for the creditor to conjoin the two actions, and to sue simultaneously *de peculio et de in rem verso*, *ibid.*
4. *The tributorian action.*—When *filiusfamilias* or slave, with the knowledge of the parent or owner, had embarked any part of his *peculium* in trade, the trade creditors were entitled to claim on the trade assets *pari passu* with the parent or owner, who might be proceeded against in an *actio tributoria* to compel him to pay a *pro rata* dividend,

ADJECTICIAN ACTIONS—*continued*.

G. iv, 72. But any creditor entitled to the tributorian might of course, if more for his advantage, employ that *de peculio* instead, 74a.

ADJUDICATIO (I.), one of the clauses of a *formula*, G. iv, 39, (see *Formula*, 1), used only in the *actio familiae erciscundae*, *a. communi dividundo*, and *a. finium regundorum*, 42, (see those words), and coming after the *demonstratio* and *intentio*, 44 and note. It empowered the judge to adjudicate to each of the litigants such a share of the matter in dispute as he considered him entitled to, 42, 44, note.

ADJUDICATIO (II.), the award of the judge in any of the three divisory actions enumerated in last head, U. xix, 16; it conferred upon the parties a quiritarian right of property in what was adjudged to them, whether *res Mancipi* or *nec Mancipi*, *ibid*.

ADJUDICATUS, G. iii, 199 and n. 2, 189, note 2; see *Judicatum*.

ADOPTION and ADROGATION, G. i, 97–107, U. tit. viii. See also *Parent and child*; *Patria potestas*.

1. *Adoption, what?*—Adoption was a mode of transferring a person into a new family, and placing him in *patria potestate* of another than his natural parent, G. i, 97, U. viii, 1; and so complete was the transfer that the adoptive parent was entitled to pass the child in adoption to a third party, G. i, 105. The adoption was either of a *paterfamilias* (see U. iv, 1, note), specifically *adrogatio*, or of a *filiusfamilias*—adoption in the stricter sense, G. i, 99, U. viii, 2, 3.
2. *Adrogation of a paterfamilias*.—This could take place only in Rome, G. i, 100, U. viii, 4; for it required to be sanctioned by vote of the *comitia*, G. i, 99, U. viii, 3. An *adrogatus* could be adopted only in the character of a son, G. i, 99; if he had children of his own *in potestate*, they passed into the *potestas* of the adrogator as grandchildren, G. i, 107, U. viii, 8.
3. *Adoption of a filiusfamilias*.—The transfer here was the act of the natural *paterfamilias*—for it was only a child *in potestate* that could be given in adoption, G. i, 99—by a somewhat intricate process described in G. i, 134, ending with a *vindicatio*, i.e. an *in jure cessio* (see *In jure cessio*), before the praetor or a provincial governor, G. iv, 100, 134, U. viii, 3, 4. The child might be adopted either as a son or grandson, G. i, 99; it being immaterial in the latter case whether the adopter had a son of his own or not, U. viii, 7.
4. *Who could or could not adrogate or adopt*.—Women could

ADOPTION and ADROGATION—*continued*.

not adopt in either way, having no *potestas*, G. i, 104, U. viii, 8a; but an unmarried man might, U. viii, 6, and so might one unable to procreate, G. i, 103, U. viii, 6. The adopter of course required to be the senior, G. i, 106 and note.

5. *Who could be adrogated or adopted*.—A woman could not be adrogated, G. i, 101, U. viii, 5; neither by the earlier law could a male who was a pupil, though allowed under the imperial law where circumstances justified it, G. i, 102, U. viii, 5. But a child of either sex, of any age, and of any degree of relationship to the natural parent, if only *in potestate*, might be given in adoption, G. i, 99, 101, 102, U. viii, 3, 5.
6. *Results for the adrogating or adopting parent*.—In adrogation invariably, and in adoption when the child was adopted as a son, (*i.e.* not as a grandson or remoter descendant), the adopting parent got a *suus heres* (see *Agnatio sui heredis*), whom he was bound to mention in his testament; consequently one made by him previously was thereby invalidated, G. ii, 138, U. xxiii, 3. See *Testament*, 22.
7. *Results for the adrogated or adopted child*.—The child became so identified with his new family that, while the relationship lasted, it was an impediment to his marriage with any member of it within the prohibited degrees, G. i, 59, 61; and even after its dissolution he was forbidden to marry any member of it who had been related to him as an ascendant, 59. Under both the Twelve Tables and the edict, if the child was still *in potestate* of his adoptive parent at the latter's death, he succeeded to him *ab intestato* equally with his natural children, G. iii, 2, U. xxviii, 8. By the Tables he had no longer any legal right of succession to his natural parent, the civil relationship having been destroyed by the *capitis deminutio* (which see, No. 3) involved in the adoption, G. i, 158, 162, U. xi, 13; but the edict allowed him to claim his natural parent's succession as a cognate, on failure of agnates, G. iii, 31, (see *Bonorum possessio*, 16). Both by the Tables and the edict the adoptive child had the rights of a natural child in regard to the testament of his adoptive parent, provided he was still in the adoptive family when the latter died, G. ii, 136, U. xxviii, 3, (see *Bonor. poss.*, 6).
8. *Results peculiar to adrogation*.—The estate of the adrogated *paterfamilias* passed to the adrogator *per universitatem*, G. ii, 97, 98, with exception of such rights as were

ADOPTION and ADROGATION—*continued.*

destroyed by *capitis deminutio* (which see, No. 3), G. iii, 83. The adrogator did not, however, become liable in law for his new son's personal debts, 84, (though he did for his hereditary ones, as he himself became heir through his son, *ibid.*); but equity gave the creditors relief by *utiles* or fictitious actions (see *Actions*, 6), in the manner described in G. iii, 84, iv, 38, 80.

9. *Emancipation of adrogated or adopted children.*—The effects were these,—that the child then ceased to have any rights in regard to the adoptive parent's succession, testate or intestate, G. ii, 136, U. xxviii, 3, but began from that moment to have the rights of an emancipated child in reference to that of his natural parent, G. ii, 137, (see *Emancipation*, 4).

ADPROMISSIO, see *Suretyship*.

ADQUISITIO PER UNIVERSITATEM, varieties of, G. ii, 98 and notes.

ADROGATION, see *Adoption*.

ADSECTOR LIBERTATIS, G. iv, 14 and n. 2; see *Slavery*, 9.

ADSTIPULATION, G. iii, 110–114; see also *Stipulation*.

1. *What?*—Adstipulation was the addition of a second stipulant in a stipulation, to whom the promiser engaged to pay what he had already promised to pay to the principal stipulant, G. iii, 110, 112. The second stipulation, however, did not require to be in the same words as the first, and might be for a smaller sum, or conditional while the first was pure, 112, 113.
2. *Its purpose.*—It was seldom employed except when the original stipulation was for payment after the stipulant's death, G. iii, 117; in which case the adstipulator might receive payment or sue upon the contract as the stipulant's agent, with responsibility to the latter's heirs *ex mandato*, 111, 117.
3. *Peculiarities.*—Adstipulation by a slave was useless, G. iii, 114; that of a *filiusfamilias* gave no right of action to his *paterfamilias*, *ibid.*; he himself could not sue upon it until he had passed out of the *potestas* (see *Patria pot.*) without *capitis deminutio*, (see *Cap. dem.*, 2), *ibid.*; if he died before payment was due, action was not competent to his heirs, *ibid.*, iv, 113. An adstipulator who fraudulently accepted (see *Acceptilation*) was liable in damages under the Aquilian law, G. iii, 215, (see *Wrongful damage to property*, 4); which were doubled if he disputed his liability, G. iii, 216, iv, 9, 171.

AEDIFICATIO, acquisition of property by, G. ii, 73; remedies, 76, (see *Property*, 6). *Aedificatio* as one of the modes in



AEDIFICATIO—*continued.*

which a latin acquired citizenship, G. i, 33, U. iii, 1, (see *Junian latinity*, 7).

AEDILES, curule, their edicts, G. i, 6; their functions, 6, note 3.

AELIA-SENTIAN LAW, the, of A.D. 4, was intended to regulate manumission of slaves, G. i, 13 and n. 1, but did not apply to that of free persons *in causa mancipii*, G. i, 139, (see *Mancipii*, etc., 3). The following were its leading provisions :—

1. *Manumission in fraud of creditors.*—It prohibited any manumission in fraud of creditors or patrons, G. i, 37, U. i, 15, —a prohibition afterwards extended to peregrins, to whom the provisions of the statute itself did not apply, G. i, 47.
2. *Manumission by owners under twenty.*—Owners under twenty years old were not to manumit their slaves except *vindicta* (which see), before a magistrate, U. i, 7, in presence of a council which sat at stated times for the purpose of sanctioning manumissions, G. i, 20, U. i, 13, and which had heard and approved the reasons of it, G. i, 38, U. i, 13, such as kinship between owner and slave, etc., G. i, 19, 39.
3. *Manumission of slaves of bad character.*—Slaves who had been punished for crime or otherwise disgraced were not on manumission to become citizens, but to be of the same condition as deditician peregrins, G. i, 13–15, U. i, 11, incapable of ever attaining citizenship, and subject to many and serious disabilities, G. i, 25–27, (see *Deditician freedmen*).
4. *Manumission of slaves under thirty years of age.*—Manumission of slaves under thirty, even of unblemished character, was not to make them citizens unless it had been accomplished *vindicta*, on cause approved by the council, G. i, 18, U. i, 12.
5. *Exception to the last two rules in the case of an insolvent owner.*—An insolvent owner might in his testament institute or substitute one of his slaves, even one who had been disgraced or was under thirty years old, as his necessary heir with freedom, who would take the estate and become a citizen in the event of the voluntary heirs all declining, G. i, 21, U. i, 14, (see *Necessarii heredes*).
6. *Remedy provided for slaves under thirty manumitted irregularly.*—In aid of a slave under thirty, whose manumission had not made him a citizen because the combined requirements of *vindicta* and *consilium* had been disre-

AELIA-SENTIAN LAW—*continued*.

garded, it contained this provision,—that if he married a woman not a peregrin, in presence of seven witnesses, to whom he declared that he was doing so in order to have the benefit of the statute, he might, after a child of the marriage had reached the age of twelve months (*anniculus*), prove those facts to the praetor, and by him be declared a citizen, along with his wife and child if she was not one already, G. i, 29, (see *Causae prob. ex l. Aelia Sentia*).

7. *Extension of the remedy by subsequent legislation*.—Ulp. in iii, 3, says this provision was introduced by the Junian law; the probability is that the latter only confirmed it, and declared the same procedure competent to those under thirty who had not been manumitted by any of the recognised modes of manumission, but informally, or whose manumission had proceeded only from a bonitarian owner (which see), G. i, 29, note, as amended in *Additions, etc.* A Sct. of the time of Vespasian further extended it to those irregularly manumitted after passing the age of thirty, G. i, 31. Hence the phrase *ex lege Aelia Sentia ad civitatem pervenire*, G. iii, 73.

AEQUUM *est neminem cum alterius detrimento et injuria fieri locupletiores*; see G. ii, 82, note 4.

AES ET LIBRA, the copper and the scales used as a solemnity in various transactions of the *jus civile*, e.g. mancipation (which see) either of *res Mancipi* (which see) or of free persons, G. i, 119, ii, 23, U. xix, 3; in coemption (see *Manus*, 2), G. i, 113; in emancipation, remancipation, and adoption (see those words), G. i, 132, 134; in the formal contract of *nexum* (which see), G. iii, 89, note; in *nexi solutio* (which see), G. iii, 173, 174; and in *testamentum per aes et libram* (see *Testament*, 3, 4), G. ii, 102–104, U. xx, 2, 9. The procedure is described in G. i, 119, and its origin explained in G. i, 122; latterly it was a mere formality, though an essential one, G. ii, 104, note 8.

AES MILITARE, *aes equestre*, and *aes hordiarium* might be recovered by *pignoris capio*, G. iv, 27, (see *Legis actiones*, 6).

AFFINITY, *adfinitas*, as a bar to marriage, G. i, 63; see *Marriage*, 4.

AGGRIPINA, her marriage with her uncle Claudius, G. i, 62.

AGNATIO (OR ADGNATIO) SUI HEREDIS, advent of a *suus heres* (see *Sui heredes*), invalidated a testament, U. xxiii, 2, (see *Testament*, 22). There was such agnation when a living *postumus* was born to the testator, G. ii, 131, U. xxii, 18; and though Ulp. xxii, 15, defines *postumus* as a lawful child *in utero* at the date of his father's testament, Gai.

AGNATIO SUI HEREDIS—*continued.*

ii, 131, includes any lawful child born thereafter, (see *Postumi*). There was *quasi agnatio sui* when an immediate male *suus heres*, say a son, of the testator's died or was emancipated, leaving a child *in potestate* of the latter, G. ii, 133, 134, U. xxiii, 3. In both of these cases, however, *ruptio testamenti* was avoided by the testator's having taken the precaution of either instituting or disinheriting the *suus*, (see *Testament*, 10). There was also *quasi agnatio sui* when a testator adopted a child as his son, G. ii, 138, U. xxiii, 3; when he took a wife *in manum*, *ibid.*, for she acquired the rights of a daughter (see *Manus*, 4), G. i, 115*b*; or when a son of his was manumitted from a first or second mancipation (see *Emancipation*, 1, 3), G. ii, 141, U. xxiii, 3. But in the two first of those cases *ruptio* was not excluded by previous institution,—disherison was impossible; nor in the third by either institution or disherison. Finally there was *quasi agnatio sui* by *erroris causae probatio* (which see), G. ii, 142, 143, converting a *matrimonium non justum* of the testator's into *justum matrimonium* (see *Marriage*, 1, 8), and thus placing the issue of it *in potestate*, G. i, 67. If cause was proved during the testator's life, a previous testament was thereby invariably invalidated; but if not proved until after his death, then, by a *Sct.* of Hadrian's, there was no *ruptio* unless the child had been neither instituted nor disinherited, G. ii, 142, 143.

AGNATION, *agnatio*, G. i, 156, iii, 10; U. xi, 4, xxvi, 1.

1. *Definition*.—Agnation was *legitima cognatio*, G. iii, 10, U. xxvi, 1,—kinship of the *jus civile*, as distinguished from the natural or blood kinship of cognation, G. i, 156. It was a relationship through males; for those alone were agnates *inter se* who were in the *potestas* of a common parent, or would have been had he been alive at the moment. And as the relationship resulted from the *patria potestas*, it might arise from anything whereby this was created, *e.g.* adoption, adrogation, etc., as also from *in manum conventio*, U. xxvi, 7, which put a wife in the position of a daughter to her husband, and a sister to her children, G. iii, 14. Apart from adoption, *in manum conventio*, etc., it could have no existence for those who were not free by birth, and so had never been *in potestate*; consequently in succession to freedmen that of agnates was unknown, G. iii, 40.
2. *Degrees*.—It was of different degrees, G. iii, 10, the nearest being that of brother and sister, who were frequently

AGNATION—*continued*.

described as *consanguinei*, *ibid.*, U. xxvi, 1; and following it that of a brother and a brother's children, then that of the children of two brothers, often called *consobrini*, and so on, G. iii, 10. For the mode of counting the degrees, see U. v, 6, note 2.

3. *Rights it conferred*.—The nearest agnates were entitled at law to the tutory of a pupil agnate, G. i, 55, (see *Tutory*, 2), and to succeed *ab intestato* to one who had died without *sui heredes*, G. iii, 9, U. xxvi, 1, (see *Intestate succession*, 4); but by the praetorian system some who by the *jus civile* were neither *sui* nor agnates were preferred to them, G. iii, 26, U. xxviii, 8, (see *Bonor. possessio*, 15).
4. *Its extinction by capitis deminutio*.—The relationship itself and the legal rights it conferred were lost by *capitis deminutio* of any sort, (see *Cap. dem.*, 1), G. i, 158, 163, iii, 21, U. xi, 9; but the praetors admitted *minuti* to the succession after agnates *integri juris*, G. iii, 27, U. xxviii, 9, for though the civil relationship was gone the natural one remained, G. i, 158, iii, 27, (see *Bonor. poss.*, 16).

ALBUM PRAETORIS, the white boards on which the praetor's edicts, etc., were published, G. iv, 46.

ALIENATION, see *Property*, 9.

ALIENI JURIS PERSONAE, those domestically dependent, *i.e.* subject to the *jus* of a family head; see also *Persons*, 3.

1. *Who were alieni juris*.—See *Persons*, 3.
2. *Their disability and capacity as regarded property*.—They were so much subject to the *paterfamilias* that not merely slaves,—who were things, and might be bought and sold, G. ii, 15, iv, 40, U. xix, 1,—but *filiifamilias* and wife *in manu*, if taken from him surreptitiously, were held to have been stolen, G. iii, 199. They could have nothing of their own, G. ii, 87, and all they acquired accrued to their *paterfamilias*, G. ii, 86, iii, 163; but while they might acquire by all natural modes, and even by mancipation, G. ii, 87, iii, 167, they could not do so by *in jure cessio*, G. ii, 96.
3. *Their disability and capacity in obligation*.—They might contract with third parties for payment to or performance for the *paterfamilias*, G. ii, 87; but he was not liable on their contracts, except in the case of slaves and *filiifamilias*, for whom he might in some cases be made responsible by the praetorian adjectician actions (see *Adject. actions*), G. iv, 69–74, just as for their delicts he was answerable in noxal actions (which see), G. iv, 75–79. Civilly none of them but a *filiusfamilias* could oblige himself by contract, G. iii, 104; though they might do so naturally (see



ALIENI JURIS PERSONAE—*continued*.

*Obligation*, 5, 10), and have their engagements effectually guaranteed by sureties, G. iii, 119. Between them and him to whom they were subject there could be no civil obligation, G. iv, 78; yet in certain cases natural indebtedness on their part was recognised, G. iv, 73.

4. *Their disability and capacity in matter of testaments*.—As they had nothing of their own they could not make a testament, G. ii, 112, U. xx, 10, with a limited exception in the case of *filiifamilias* who were or had been in the army, U. xx, 10, and slaves belonging to the state, U. xx, 16; while, if they were instituted heirs by third parties, they could not enter except on the instructions of those to whom they were subject, G. ii, 87.

5. *How they ceased to be alieni juris*.—See G. i, 124–141, and separately *Slavery*, *Patria potestas*, *Manus*, *Mancipii*, etc.

ALLUVION as a means of acquiring property, G. ii, 70; distinguished from avulsion, 71. See *Property*, 4.

ANIMALS, wild and domesticated, property in, G. ii, 66–68.

ANNICULUS, G. i, 29, 32, 73, U. iii, 3; see *Aelia-Sentian law*, 6.

ANTIQUUM JUS, see *Jus antiquum*.

ANTONINUS (IMPERATOR) sometimes means Antoninus Pius, sometimes Marcus Aurelius, sometimes Caracalla; see those names under *Constitutiones principum*.

APOLLO DIDYMAEUS, U. xxii, 6.

AQUA ET IGNI INTERDICTIO was a *media capitis deminutio* (see *Cap. dem.*, 1), G. i, 161, U. xi, 12, of which the nature is described in G. i, 128, n. 2; it reduced the individual who suffered it to the condition of a peregrin, G. i, 128, U. x, 3, (see *Peregrinity*).

AQUILIAN LAW, see *Wrongful damage to property*.

ARBITER and ARBITRARIA FORMULA in procedure in interdicts, G. iv, 141, 163–165; see *Interdicts*, 11.

ARBITRARY ACTIONS, see *Actions*, 8.

ARCARIA NOMINA, G. iii, 131; see *Literal obligations*, 2.

ARGENTARIUS, peculiarities of pleading in action by him against a customer, G. iv, 64, 66–68; combined auctioneering with banking, G. iv, 126*a* and note.

ARRA, earnest given in certain contracts, G. iii, 139; see *Sale*, 1.

AS, use of, in mancipation explained, G. i, 122; by Julia Papirian law, converting cattle-penalties into money-penalties, 100 asses were declared equivalent to an ox, 10 to a sheep, G. iv, 95, note 4; the 500 asses of the *leg. actio sacramenti* were afterwards converted into 125 sesterces, *ibid.* note 2.

ASSE INSTITUTUS, EX, instituted in a testament as sole heir, as

ASSE INSTITUTUS, EX—*continued*.

distinguished from *ex parte institutus*, instituted only to part, G. ii, 259.

ASSIZES, provincial, G. i, 20 and n. 2.

ATILIAN TUTOR, see *Tutory*, 4, 13, 22.

ATROX INJURIA, G. iii, 225; see *Personal injury*, 2.

AUCTORATUS, a freeman who had voluntarily engaged as a gladiator, and who was so much in the possession of his *lanista* that the latter had an *actio furti* against any one carrying him off, G. iii, 199.

AUCTORITAS TUTORIS, see *Tutory*, 7, 16, 23.

AUGUSTUS was the first to authorise a *filiusfamilias* to dispose of his *peculium castrense* (which see) by testament, U. xx, 10.

BANKRUPTCY, (see *Emptio bonorum*), entailed infamy, G. ii. 154, and the sale of the estate and distribution of the proceeds amongst the creditors did not imply discharge of the bankrupt, G. ii, 155. If, however, an insolvent had made one of his slaves his necessary heir (see *Necess. heredes*), the latter, though rendered infamous by the sale in his name after his succession, G. ii, 154, was entitled to retain all his own subsequent acquisitions, however small the dividend paid to the deceased's creditors, 155. Bankruptcy of a partner in strictness dissolved the partnership (see *Partnership*, 3), G. iii, 154.

BARTER, *permutatio*, G. iii, 141; see *Sale*, 2.

BELLI JUS, G. iii, 94.

BENEFICIUM DIVISIONIS, G. iii, 121, 122; see *Suretyship*, 4.

BITHYNIANS, their quasi-tutory of women, G. i, 193.

BONA FIDES in usucapion of a thing delivered to the usucapient by one who was not its owner (see *Usucapion*, 3), was belief by the usucapient, at the moment of acquiring, that the party from whom he had received the thing was in fact its owner, G. ii, 43. *Bona fides* in contracts was the general standard of fairness and equity according to which parties were in some cases to measure their obligations, G. iii, 137, 155.

BONAE FIDEI JUDICIA, the, are enumerated in G. iv, 62; see *Actions*, 8.

In them the *intentio* of the *formula* was qualified with the words *ex fide bona*, G. iv, 47; consequently *liberum est officium judicis*, G. iv, 114. He was bound *ex officio* to allow set-off (see *Compensation*) of any counter-claim of the defender's arising out of the same matter, and condemn only in the balance, G. iv, 61, 63; and if after litiscontestation (which see) the defender satisfied the pursuer's claim, it was the judge's duty to acquit, G. iv, 114.

BONAE FIDEI POSSESSIO was technically the possession of an individual who was not, yet in good faith believed himself, owner; his rights, though inferior to those of a full proprietor, were superior to those of a merely quiritarian *dominus*, (see *Quir. ownership*), G. iii, 166.

1. *Rights of a bonae fidei possessor as against the true owner.*—If he had in good faith acquired a thing from one not its owner, he might—unless it was *res furtiva*, G. ii, 45—complete his title to it by possession for the requisite period, G. ii, 43, 44, (see *Usucapion*, 3). If the owner surreptitiously deprived him of it, he had against the former an *actio furti*, G. iii, 200. If in good faith he was in possession of another man's slave, he was entitled, as against the owner, to all the slave's acquisitions due to the latter's labour or his own funds, G. ii, 92, iii, 164. If, being in good faith in possession of another man's property, he made additions to it which augmented its value, as by building, sowing, or planting on his lands, or writing a treatise on his parchments, or painting a picture on his pannel, he could not be required to yield the possession until he had been reimbursed, G. ii, 76–78, (see *Property*, 6).

2. *His rights as against third parties.*—If a third party disputed his right, and withheld from him that of which he had been in possession, he had against him a praetorian real action in the Publician, G. iv, 36, (see *Publ. action*). If any third party deprived him of his possession surreptitiously, he had against him an *actio furti*, G. iii, 200. And if it was a freeman that he was in good faith possessing as a slave, he was entitled to his acquisitions to the same extent as if the freeman had been a *servus alienus*, G. ii, 92, iii, 164, and might through his agency possess and usucapt, G. ii, 94.

BONIS, IN.—A person who, *e.g.*, had acquired a *res Mancipi* by simple delivery, was said to have it only *in bonis*, in his estate; the *dominium ex jure Quiritium*, or legal ownership title, remained in the transferor until usucapion was completed, because of the omission of the proper form of conveyance, G. ii, 41, U. i, 16, (see *Bonitarian ownership*). *In bonis habere* was not the same thing as *bona fide possidere*; see the distinction in G. ii, 41 compared with 43.

BONITARIAN OWNERSHIP. See also *Property*; *Bonis, in*; *Quiritarian ownership*.

1. *Origin and meaning of the phrase.*—Bonitarian ownership, *dominium bonitarianum*, was first suggested by the words of Theoph.—φυσική δεσποτεία λέγεται *in bonis*, και ὁ δεσπότης

BONITARIAN OWNERSHIP—*continued*.

βοιτάριος, G. ii, 40, note; it means the same thing as *in bonis habere*,—beneficial ownership without the legal title, G. ii, 41, as distinguished from the *plenum jus domini*, which included both, *ibid.*, and the *nudum jus Quiritium*, which was the legal title without the beneficial interest, G. iii, 166. The distinctions, results of praetorian equity, eventually disappeared with Justinian's abolition of the civil forms of conveyance, G. ii, 40, note.

2. *How a bonitarian right was created*.—When one citizen acquired a *res mancipi* (which see) from another, but merely had it delivered to him instead of conveyed in due form of law, he got only the bonitarian ownership, G. ii, 41, U. i, 16; but if it was from a peregrin he thus acquired, he held it *pleno jure*, conveyance according to the forms of the *jus civile* being impossible, U. i, 16, note 2. The right of a *bonorum possessor* too in the corporeal items of the estate to which he succeeded was bonitarian, G. iii, 80, (see *Bonor. possessio*, 5); and so was that of a *bonorum emptor* in the corporeals of the bankrupt estate he had purchased, *ibid.*, (see *Emptio bonorum*, 3).
3. *Rights of a bonitarian owner*.—Having the beneficial interest, it was he that, *e.g.*, had *potestas* over a slave he had acquired informally, G. i, 54, and he got all the slave's acquisitions, G. ii, 88, iii, 166. If he had to sue for his recovery from a third party the praetor granted him the Publician or other fictitious action, G. iv, 34–36. But he could not by manumission make him a citizen,—only a latin, G. i, 17, (see *Manumission*, 2), and therefore he could not by testament institute him his heir with freedom, G. ii, 276, note, U. xxii, 8, (see *Testament*, 14). If the latin was a male under puberty, or a woman, it was the quiritarian owner that was tutor, for this was a *jus legitimum*, G. i, 167, U. xi, 19, (see *Tutory*, 19); but the latin's estate nevertheless went on his death to his bonitarian manumitter, G. i, 167, iii, 56, (see *Succession to Junian latins*, 2).
4. *How the right was converted into plenum dominium*.—The bonitarian right was only temporary; it became quiritarian on the completion of the ordinary usucapion, G. ii, 41, (see *Usucapion*, 2, 4).

BONORUM EMPTOR, see *Emptio bonorum*.

BONORUM POSSESSIO, G. ii, 118–122, 125, 126, 132, 147–151; iii, 25–38; U. tit. xxviii. See also SUCCESSION.

I. BONORUM POSSESSIO GENERALLY, (see G. ii, 119, note 1).

1. *Origin*.—In the rules of the *jus civile* in regard to succession there was much naturally unjust, G. iii, 25, which



BONORUM POSSESSIO—*continued*.I. BONORUM POSSESSIO GENERALLY—*continued*.

- the praetors so far remedied by granting to those they considered entitled in equity to an inheritance which the law denied them, possession of a deceased person's estate, —the benefits of the inheritance without the name of it, U. xxviii, 12; and once its advantages were recognised it often was applied for and granted to those who had a good legal title, but desired to have the aid of some of the remedies the praetors had invented for *bonor. posses-sores*, but which did not apply to heirs, *heredes*, G. iii, 34.
2. *Varieties*.—There were three varieties,—(a.) *bonor. poss. contra tabulas*, i.e. in contradiction of a testament, granted to *sui heredes* (which see) of a testator, other than a son, who were unmentioned in the deed, G. ii, 135, U. xxviii, 2,—praeterition of a son *in potestate* invalidated the testament and caused intestacy, G. ii, 123, U. xxii, 16; (b.) *bonor. poss. secundum tabulas*, i.e. in terms of a testament, granted to testamentary heirs whose right was in law defective through a flaw in the execution of the deed, or the subsequent occurrence of something that rendered it invalid, G. ii, 118, 119, 147, U. xxviii, 5, 6; (c.) *bon. poss. ab intestato*, i.e. in the absence of a testament, G. iii, 26–31, U. xxviii, 7, granted to claimants in the order established by the *edictum successorium*, U. xxviii, 12.
  3. *How obtained*.—The grant had to be formally applied for, *bonor. poss. petere*, G. ii, 98, etc., iii, 37, U. xxviii, 10, etc. To petition for that *ab intestato* ascendants and descendants of the deceased were allowed a year, other persons being limited to 100 days, U. xxviii, 10; the period for those entitled in the second place beginning when that of those entitled in the first had expired, and so on, U. xxviii, 11.
  4. *Effect as against the juris civilis heir*.—The *bonor. possessio* was granted *periculo petentis*, and might be *cum re*, real and substantial, or *sine re*, merely nominal, according as the grantee could or could not maintain it against the *ipso jure* heir, G. ii, 148, iii, 35, U. xviii, 13; for the latter was not bound to apply for *bonor. poss.*, but entitled to stand on his testamentary or statutory title, G. iii, 37. Examples of *bonor. poss. sine re* occur in G. ii, 149, iii, 36, 37, U. xxviii, 13.
  5. *Effect as against third parties*.—The succession of the *bonor. possessor* being not civil but praetorian, it gave him only a bonitarian right in the corporeal items of the deceased's estate, convertible into quiritarian right by usucapion, G.

BONORUM POSSESSIO—*continued*.I. BONORUM POSSESSIO GENERALI—*continued*.

iii, 80, (see *Bonitar. ownership*, 2, 4); to enable him to obtain possession the praetor gave him the interdict *quorum bonorum*, (see *Interdicts*, 5), G. iii, 34, iv, 144. Not being heir, G. iii, 32, he was not entitled directly to an heir's actions against third parties; but, by interpolation of a fiction of heirship, the praetor adapted them to the altered circumstances, rendering them *utiles* or serviceable, Gai. ii, 81, iv, 34, U. xxviii, 12, (see *Actions*, 6).

## II. BONORUM POSSESSIO CONTRA TABULAS.

6. *To sui praeteriti (other than sons)*.—When a *suus heres*, other than a son (see above, No. 2), had been neither instituted nor disinherited in a testament, he was entitled under the *jus civile* to a share of the inheritance by accretion, G. ii, 124, (see *Adcretio*, 3); but the praetor held this insufficient where he had been passed over in favour of a stranger, and allowed him (and other *sui* concurring with him) possession of the whole estate, thus rendering the testament inoperative, G. ii, 125. And this right was competent not only to natural children but also to adoptive ones, if still *in potestate* of the adoptive father-testator at his death, U. xxviii, 3.
7. *To emancipated children*.—By the *jus civile* a testator was not required to mention his emancipated children (see *Emancipation*), for they had ceased to be *sui heredes*, G. ii, 135. But the praetors, recognising their natural claims, required that they should be either instituted or disinherited, giving them *bon. poss. contra tab.* if they were not, *ibid.*, U. xxviii, 2; under condition however of collation (which see) with instituted *sui*, U. xxviii, 4. If an emancipated child had passed into an adoptive family, this possession was not competent to him, U. xxviii, 3.
8. *To a patron*.—See *Succession to citizen freedmen*, *Succession to Junian latins*.
9. *Peculiarity in the case of females*.—A rescript of Marcus Aurelius' enacted that women should not in any case be allowed more by *bonor. poss. contra tab.* than they would have been entitled to by accretion of the *jus civile* (above, No. 6),—a rule that could apply strictly only to *suave*, but whose principle was extended to *emancipatae*, G. ii, 126.

## III. BONORUM POSSESSIO SECUNDUM TABULAS.

10. *Circumstances in which it could be applied for*.—Some formality in the execution of a testament might have been neglected, such as the *familiae venditio* or the *nuncupatio*, G. ii, 104, (see *Testament*, 3, 4), or, in the case of

BONORUM POSSESSIO—*continued.*III. BONORUM POSSESSIO SECUNDUM TABULAS—*continued.*

that of a woman, her tutor's *auctoritas*, G. ii, 118, (see *Tutory*, 16, 23), in any of which cases it was said to be *non jure factum*, G. ii, 146; or, though *ab initio* valid, it might have been subsequently invalidated by *agnatio sui heredis*, a later testament, or the testator's *capitis deminutio*, G. ii, 138–145, U. xxiii, 2–4, (see *Testament*, 22, 23): in such circumstances the testamentary heirs had no legal right, but were nevertheless entitled, under the qualifications stated below, Nos. 11, 12, to *bonor. poss. secundum tabulas*, G. ii, 119, U. xxiii, 6, xxviii, 6.

11. *What still required as regarded testator and testament.*—To justify it in any case, the praetors required that the testator, even though *capite deminutus* in the interval, should have been a citizen and *sui juris* at the moment of his death, G. ii, 147, U. xxiii, 6; and as regards his testament that it was sealed by at least seven citizen witnesses, G. ii, 119, U. xxiii, 6, xxviii, 6.
12. *Who preferred to the heredes scripti in the invalid testament.*—Any one with a good claim *contra tabulas* excluded the *scripti heredes*, U. xxviii, 5. So at one time did agnates of the testator claiming *jure legitimo*, G. ii, 119, (see *Intestate succession*, 4); but by a rescript of Marc. Aurelius' the *scripti heredes* could defeat their claim with an *exceptio doli*, G. ii, 120, 121, (see *Exception*, 8). If the testament was a woman's, and the objection to it that it was made without the *auctoritas* of patron or parent (see *Tutory*, 16, 23), the latter had preference over the *scripti heredes*, G. ii, 122; but if in tutelage under an Atilian tutor (who had no right of succession), the claim of the *scripti heredes* was preferable to that of her agnates, *ibid.*

## IV. BONORUM POSSESSIO AB INTESTATO.

13. *The evils that were to be remedied.*—The civil rules of intestate succession were extremely strict, G. iii, 18: for they did not admit emancipated children, G. ii, 19, or agnates who had undergone *capitis deminutio* (which see, 2), G. ii, 19, 21; they admitted no female agnate except a sister, 23; if the nearest agnates did not take, no right was recognised in those of the next degree, 22,—*in legitimis hereditatibus successio non est*, U. 26, 5; and cognates, *i.e.* those of kin to the deceased through females, were not admitted at all, G. ii, 24. These and other *iniquitates*, G. ii, 25, the praetors remedied by establishing a new order of succession, which Ulp. says embraced seven *gradus* (or rather *ordines*), U. xxviii, 7; some of them,

BONORUM POSSESSIO—*continued.*IV. BONORUM POSSESSIO AB INTESTATO—*continued.*

however, applied only to the successions of freedmen, and are referred to under *Succession to citizen freedmen*, 8.

14. *The bonor. possessio granted to liberi, descendants.*—The first entitled were those descendants of the testator whom he was bound, either by the *jus civile* or the edict, to institute or disinherit if he made a will,—in other words, his wife *in manu*, (who was regarded as a daughter in matter of succession), with his natural sons and daughters, whether *in potestate* or emancipated, and the representatives of those that were dead, G. iii, 26, 63, note 1, U. xxviii, 7; adoptive children concurring if *in potestate* at deceased's death, but not if emancipated (see *Adoption*, 7), U. xxviii, 8.
15. *That granted to agnates.*—Under their old name of *legitimi heredes* the deceased's nearest agnates were admitted in the second place, U. xxviii, 7.
16. *That granted to cognates.*—Though the grant in the third place was nominally to cognates, *i.e.* those related through females, G. iii, 30, U. xxviii, 7, 9, yet with them were included agnates of the first degree who through *capitis deminutio* had lost their legal rights, G. iii, 27, U. xxviii, 9; agnates of the second or a remoter degree on failure of the first, G. iii, 28; female agnates more distantly related than sisters, 29; and natural children of the deceased's who were at the moment in an adoptive family, 31.
17. *That granted to the survivor of husband and wife.*—This came last, U. xxviii, 7; *i.e.* to a wife if not *in manu*; for if *in manu* she was *loco filiae* and took with *liberi*, G. iii, 5.

CADUCARIA LEX, U. xxviii, 7, a name given to the Julian and Papia-Poppaeian law, which see.

CADUCITY, testamentary lapse, U. tit. xvii.

1. *What meant by caducity.*—With the two exceptions referred to below, Nos. 6 and 7, the word applied only to testamentary gifts valid and capable of being taken so far as the *jus civile* was concerned, but which the donee was either prevented taking by reason of some prohibition unknown to the *jus civile*, or failed to take from some other cause, U. xvii, 1.
2. *Influence of the Julian and Papia-Poppaeian law.*—It was this statute that originated it; for by prohibiting unmarried persons to take testamentary inheritances or



CADUCITY—*continued.*

legacies at all, and childless persons to take more than a half of what was left them (see *Jul. and P. P. law*, Nos. 4, 5), and by its postponement of the date of vesting from the time of a testator's death to that of the opening of his testament (see *Jul. and P. P. law*, No. 7), it created lapses that previously had no existence, *ibid.* The Junian law (see *Junian latinity*, 4) a few years later made a testamentary inheritance or a legacy left to a Junian latin caducous, if he did not qualify himself to take it within 100 days after the opening of the will, U. xvii, 1, xvii, 3.

3. *How the Julian law disposed of the caduca.*—A caducous inheritance, where the institution was *ex parte* only, *i.e.* to a share, went first to the other testamentary heirs who either were descendants or ascendants of the testator to the third degree inclusive,—to these the *jus antiquum*, or old right of accretion (see *Adcretio*, 2), was reserved by the statute, U. tit. xviii,—or themselves were parents, G. iii, 286a, U. i, 23 and n. 3; next to legatees who had children, *ibid.*; and finally to the state, G. ii, 150, iii, 286a. If the party failing to take was sole heir, the caducity caused intestacy, G. ii, 144; but the legatees were not thereby defrauded, (see below, No. 4). Caducous legacies were dealt with in the same way as a caducous share of an inheritance, G. ii, 206, with this modification,—that a conjoint legatee who was a parent was to be preferred to heirs, G. ii, 207, 208, U. xxiv, 12, 13. *Fideicommissa* were not included in the provisions of the Julian law; latins were allowed to take them, G. i, 24, ii, 275, U. xxv, 7, and for a time so were *caelibes* and *orbi*, G. ii, 286, 286a. But this was so far altered by the Pegasian (Plancian?) Sct. that trust-gifts to *caelibes* and *orbi* were made subject to the same caducuary rules as inheritances and legacies, G. ii, 286a.
4. *Charges on a caducum ran with it.*—Caducity did not extinguish legacies, gifts of freedom, or *fideicommissa* charged on testamentary provisions; they passed to and became burdens on the caducuary beneficiary, U. xvii, 3, even when he was an heir *ab intestato*, G. ii, 144, or the fisc, U. xvii, 2.
5. *Caracalla's constitution.*—Caracalla decreed that all *caduca* should in future go to the fisc, under reservation of the right of accretion to near relatives of the testator, U. xvii, 2; but whether he meant that the fisc should be preferred to heirs and legatees entitled by the Julian law to take on the

CADUCITY—*continued*.

strength of their paternity, or that, failing such heirs and legatees, the fisc should take in future instead of the *acrarium*, is doubtful, *ibid.*, note, as amended in *Additions*, etc.

6. *Caducous dowries*.—By the Calvitian Sct. (see *SC. Calv.*) if a woman over fifty married a man under sixty, the marriage was unequal; and on its dissolution she was not allowed to claim her dowry, which went to the fisc as caducous, U. xvi, 4 and n. 3. See *Dowry*, 8.
7. *Caducity in the succession of latins*.—When a Junian latin had two patrons, and on his death one of them declined his share of his freedman's estate, it became caducous and fell to the state, G. iii, 62, (see *Succession to Junian latins*, 4).

## CAELESTIS CARTHAGINIS, U. xxii, 6.

CAELIBES, unmarried persons, were incapacitated by the Papian law for taking testamentary inheritances or legacies, G. ii, 111, 144; but might avoid the disability by marriage before the expiry of the 100 days of cretion, U. xvii, 1, xxii, 3, (see *Julian and Pap. Popp. law*, 4). They might, however, take under a military testament, G. ii, 111, (see *Testament*, 25). At one time it was held that a celibate was entitled to take a testamentary trust-gift; but this was altered by a SC. Pegasianum (?), whereby such a *fideicommissum* became caducous, like inheritances or legacies, G. ii, 286, (see *Fideicommissum*, 3, *Caducity*, 3). An unmarried person was not forbidden to adopt a child, U. viii, 6, (see *Adoption*, 4).

CAESAR'S (Julius) contemplated Code, G. iii, 140, note 2.

CALATA COMITIA, G. ii, 101, U. xx, 2.

CALUMNIA *in adfectu est*, G. iv, 178; *Calumniæ judicium*, G. iv, 163, 174–181; *Calumniæ iusjurandum*, oath of calumny, G. iv, 172, 176. See *Vexatious litigation*.

CAPERE EX TESTAMENTO, see *Jus capiendi*.

CAPITA and STIRPES in succession, G. iii, 8, 16, 61, U. xxvi, 2, 4, xxvii, 4.

CAPITAL PUNISHMENTS, what, G. iii, 189, 190, note 1.

CAPITIS DEMINUTIO (or *minutio*), G. i, 159–163, U. xi, 10–13.

1. *Idea and varieties*.—*Cap. dem.* was change in a citizen's *caput*, G. i, 159, i.e. his family position, *ibid.* note 1; and according to the *jus civile* was equivalent to death as extinctive of his personality, G. iii, 153. It was of three degrees, G. i, 159, U. xi, 10,—*maxima*, when freedom was lost, G. i, 160, U. xi, 11, (see *Freedom*); *media* or *minor*, when freedom was retained but citizenship lost,

CAPITIS DEMINUTIO—*continued*.

and the sufferer reduced to the condition of a peregrin, G. i, 162, U. x, 3, xi, 13, (see *Citizenship*, 9, *Peregrinity*); *minima*, when only the *status hominis*, G. i, 163, U. xi, 13, was changed, *i.e.* that of the individual in his private rather than his public character, U. xi, 13, note 2.

2. *Capitis deminutio minima in particular*.—To amount to *cap. dem.* the change of status required to be either permanently or temporarily for the worse,—permanently, as in the adrogation or *in manum conventio* of a person *sui juris*, G. iii, 83, U. xi, 13; temporarily, as in mancipation of a *filiusfamilias* as the first step in his emancipation or adoption, G. i, 162, 134, the mancipation putting him for the moment in the condition of a slave, G. i, 138. Change of family status without degradation was not a *minutio capitis*, as when a *filiusfamilias* became *sui juris* by his parent's death or his own inauguration as a priest of Jupiter, G. iii, 114, or a *filiafamilias* by being taken as a Vestal virgin, U. x, 5, (see *Patria potestas*, 17).
3. *Results of cap. dem. according to the jus civile*.—*Capitis deminutio*, even *minima*, put an end to the *patria potestas*, G. i, 128, 134, and to agnation, G. i, 158, 163, iii, 21, U. xxviii, 9, without, however, affecting cognation, G. i, 158, iii, 27, U. xxviii, 9, (see *Agnation*, 4, *Cognation*); that of a tutor consequently put an end to a tutory-at-law, G. i, 158, U. xi, 9, 7, though not to a testamentary tutory, U. xi, 17, (see *Tutory*, 8, 17, 22); while, whether it occurred in the person of the deceased or of the heir, it extinguished the *legitimae successiones* of the XII Tables, G. iii, 21, 27, 51, U. xxvii, 5, (see *Intestate succession*, 6, *Succession to citizen freedmen*, 1, 10). If suffered by a person *sui juris* it invalidated any testament made by him previously, G. ii, 145, U. xxiii, 4; it utterly extinguished any usufruct enjoyed by him, his claim for services from his freedmen, and any *judicia legitima* in which he was suing, G. iii, 83; it dissolved a copartnership of which he was a member, G. iii, 153; and in strict law it relieved him of liability to his creditors, G. iii, 84, iv, 38.
4. *Modification of those results by praetorian intervention*.—Many of those results, whether for the *capite minutus* or for third parties, were regarded as unjust according to natural rules, and indirectly prevented by praetorian remedies. Thus on certain conditions a testament was given effect to by grant of *bonorum possessio secundum tabulas* notwithstanding the testator's *cap. minutio*, see *Bonor. poss.*, 10, 11; an emancipated child was granted

CAPITIS DEMINUTIO—*continued*.

*bonor. poss. contra tabulas* if passed over in his parent's will, see *Bon. poss.*, 7; he was granted *bonor. poss.* concurrently with *sui* on his parent's intestacy, see *Bon. poss.*, 14; while an agnate who had lost his *jus legitimum* by his own *cap. dem.* or that of the deceased was admitted as a cognate, see *Bon. poss.*, 16. As regards creditors the praetor gave them relief by *utiles actiones*, G. iii, 84, proceeding on the fiction (see *Fictions*, 3) that *cap. deminutio* had not taken place, G. iv, 38; which the *paterfamilias*, into whose *jus* the *minutus* had passed, was bound to defend, on pain of having to give up all the estate he had acquired by the adrogation or *in manum conventio*, G. iii, 84, iv, 80, which had created a universal succession in his favour, G. iii, 83.

5. *Capitis deminutio by hostile capture*.—A citizen's capture by an enemy involved *cap. dem.*; but its usual results were in this case avoided by the *jus postliminii* and  *fictio legis Corneliae*, G. i, 129, 187, U. x, 4, xxiii, 5, (see *Captivity apud hostes*).

CAPITO, C. ATEIUS, founder of the Sabinian school or sect, consul A.D. 5, died A.D. 22, G. i, 196, note; see *Sabinians and Proculians*.

CAPTIVITY APUD HOSTES.—A citizen taken captive by an enemy became a slave and continued so while in their hands, G. i, 129, U. x, 4; but his rights were held to be suspended merely, and revived *jure postliminii* on his recrossing the frontier, *ibid.*, G. i, 187. A testament made by him previously was not invalidated by his captivity; it was good *jure postliminii* if he returned, and, under a Cornelian law equally valid if he died in captivity, thanks to a fiction that he had died at the moment of capture, U. xxiii, 5. If, had he been free, he would have been entitled to a succession *ab intestato* in the character of *suus*, then, so long as he remained captive, the agnates were excluded, U. xxvi, 3.

CARACALLA, see *Constitutiones principum*.

CASCELLIANUM JUDICIUM, a stage of procedure in the interdicts *uti possidetis* and *utrubi*, G. iv, 166a, 169; see *Interdicts*, 16.

CASSIANS AND PROCULIANS, G. i, 196, note 1; see *Sabinians and Proculians*.

CASSIUS LONGINUS, C., consul A.D. 30, one of the leaders of the Sabinians, who were sometimes called Cassians in his honour, G. i, 196, note 1; ii, 79, 195, 244; iii, 71 and note, 133, 140, 147, 161; iv, 79, 114, 170a, note, U. i, 12 and n. 2. See *Sabinians and Proculians*.



CASTRENSE PECULIUM, see *Peculium castrense*.

CASUS, see *Accident*.

CATONIANA REGULA in law of legacies, G. ii, 244; see *Legacy*, 12.

CAUSA CADERE, meaning, G. iv, 53, note 1.

CAUSAE PROBATIO EX LEGE AELIA SENTIA; see also *Aelia-Sentian law*, 4, 6, 7.

1. *The original provision*.—See *Aelia-Sentian law*, 6.
2. *Its extensions*.—See *Aelia-Sentian law*, 7.
3. *Its application*.—Cause might be proved not only by the latin himself who had married under the law or the *Sct.*, but after his death by his wife, G. i, 32, or even (with the aid of tutors) by the child, whether son or daughter, G. i, 32a, U. iii, 3, whose completed first year it was that warranted the *probatio*, G. i, 32 and note. And the marriage and all that followed might be resorted to even by a latin who had already acquired citizenship by imperial grant, but without the knowledge of his patron, G. iii, 73; for such a grant, unknown to the patron, while it gave the latin the privilege of a citizen during his life, left him a latin at his death, so that his children, though lawful, could not be his heirs, U. iii, 72.
4. *Its effect*.—The effect of the praetor's *pronuntiatio*, or finding that cause had been proved, was to make the latin a citizen, and to do the same for his wife and child if the former also was a latin, colonial or Junian, G. i, 29. If she was already a citizen, it was only her husband whose status had to be raised; for by a *Sct.* of Hadrian's the issue of a citizen wife and her latin husband was a citizen without any *causae probatio*, G. i, 30, 80, U. iii, 3, (see *Status*, 2). On becoming a citizen the latin father acquired the *potestas* over his *anniculus* and all subsequent children, G. i, 66, U. vii, 4, (see *Patria potestas*, 10), they acquiring at the same time the rights of *sui heredes* (which see), U. xxii, 14; and even though cause might not be proved until after the father's death, still the *anniculus* became a *suus* and took the inheritance, G. iii, 5.

CAUSAE PROBATIO, ERRORIS, see *Erroris causae probatio*.

CAUTIO DAMNI INFECTI, G. iv, 31, note 3.

CAUTIONES IN JUDICIAL PROCEDURE, G. iv, 89–102, 184–187.

1. *Initial security by defender for his future appearance*.—On appearing in answer to a summons (see *In jus vocatio*), if the proceedings could not be finished the same day, the defender gave security for his subsequent reappearance on a day named, G. iv, 184, (see *Vadimonium*); this was all but universal, 187.
2. *The cautiones in a vindicatio*.—In a real action by petitory

CAUTIONES IN JUDICIAL PROCEDURE—*continued*.

formula (*vindicatio*), no security was required from a pursuer suing on his own account, G. iv, 96, nor from a cognitor (see *Procuratory in litigation*, 2), because, on account of the solemnity of his appointment, he was in much the same position as his client, 97, 98; but a procurator had to give security that his client would ratify his actings, *cautio de rato*, 98. The defender, whether defending on his own account or as cognitor or procurator, in consideration of enjoying the interim possession, had to give security for implement of any judgment against him, *cautio judicatum solvi*, G. iv, 89.

3. *Those in a real action by sponsion.*—In an *in rem actio per sponsionem* (which see) the rules were the same, except that the security given by defender was *cautio pro praede litis et vindiciarum*, i.e. for the thing itself and its fruits and profits, in place of the *praedes* of the *actio sacramento* (see *Legis actiones*, 2), G. iv, 91, 94.

4. *Those given in personal actions.*—In a personal action the rules as regarded a pursuer were the same as in the real one, G. iv, 100. A party defending on his own account was not required to give *c. judicatum solvi* except in a few special cases, G. iv, 102. But where the defence was by an agent it was indispensable, 101: in the case of a cognitor, the client gave the security, *ibid.*; in that of a procurator, he himself did so, *ibid.*

5. *The stipulatio fructuaria.*—This was a security given by the party to whom the interim enjoyment of the fruits and profits had been awarded in proceedings on the interdict *uti possidetis* or *utrubi*, G. iv, 166, (see *Interdicts*, 14); if the other party, succeeding in the int., chose to disregard the *stipulatio* and proceed for the fruits in a separate *judicium*, the defender had to give *c. jud. solvi*, 169.

6. *Rules of general application.*—Tutors and curators acting for their wards were dealt with as procurators, G. iv, 99; although in their case security was sometimes dispensed with. The *cautio* was by *satisfactio*, G. iv, 88, i.e. personal undertaking of the party, backed by that of sureties, G. i, 199 and 200, note.

CENSUS.—Entry of the name of a slave, by his owner's authority, in the census at its periodical revision was one of the civil modes of freeing him; he thereby became a citizen if he was over thirty and in the quiritarian ownership of a manumitter over twenty, G. i, 17, U. i, 8, (see *Manumission*, 4, 6). A free person *in causa mancipii*, and therefore *servi loco*, might be liberated in the same way, whatever

CENSUS—*continued*.

his own age or that of the person to whom he was subject, G. i, 139; and even against the will or without the knowledge of the latter, provided he was held neither noxally nor fiduciarily, 140, (see *Mancipii etc.*, 3). A citizen wilfully evading inscription was sold as a slave by way of punishment, G. i, 160, (see *Slavery*, 1).

CENTENARIUS LIBERTUS, G. iii, 42.

CENTUMVIRAL COURT, G. iv, 16 and n. 13, 31, 95 and n. 3.

CESSICIA TUTELA, G. i, 168–172, U. xi, 6–8; see *Tutory*, 20.

CESSIO BONORUM, G. iii, 78 and n. 2.

CESSIO IN JURE, see *In jure cessio*.

CHILD, see *Parent and child*.

CHIROGRAPHUM, G. iii, 134 and note; see *Literal obligations*, 2.

CITIZENSHIP, *civitas Romana*, G. i, 94, 160, iii, 73, iv, 37, etc. U. iii, 2, xi, 11, etc.; *jus Quiritium*, G. i, 33, iii, 73, U. iii, 1, etc.

I. PRIVATE RIGHTS AND CAPACITIES OF WHICH CITIZENSHIP WAS A CONDITION.

1. *In the family relations*.—It was only a citizen that could contract *justae nuptiae*, *justum matrimonium*, G. i, 56, and it was only a woman who was a citizen, or a latin or peregrin on special concession, that could become his wife, *legitima uxor*, *ibid.*, U. v, 2–4. Only a citizen could take his wife *in manum*, G. i, 108; it was only a citizen that could have *patria potestas* over his children, G. i, 55, 189; and none but citizens could be *in potestate*, G. i, 128, U. x, 3. And as agnation was an efflux of the *patria potestas* (see *Agnation*, 1), none but citizens could have or be agnates, or enjoy or be subject to the family rights to which agnation gave rise, G. i, 158, 161, U. xi, 9.
2. *In matter of property*.—Although non-citizens enjoyed quiritarian ownership of *res nec Mancipi*, yet the *dominium ex jure Quiritium* (see *Quiritarian ownership*) of *res Mancipi* (which see), according to Gai., was confined to citizens; such things could as a rule be acquired only by mancipation, *in jure cessio*, or usucapion, and these he says were peculiar to citizens, G. ii, 65, (for when a slave acquired by mancipation or usucapion, G. ii, 87, 89, iii, 167, he did so merely as the instrument of his citizen owner, G. ii, 89). Ulp., on the other hand, says mancipation was competent not only to citizens but to colonial and Junian latins, and to peregrins to whom *commercium* (see U. xix, 5, note) had been specially conceded, U. xix, 4; this would render them capable of holding *res Mancipi* in quiritarian right if so conveyed.

CITIZENSHIP—*continued.*I. PRIVATE RIGHTS AND CAPACITIES OF WHICH CITIZENSHIP WAS A CONDITION—*continued.*

3. *In matter of contract.*—The *juris gentium* contracts were competent even to peregrins, G. iii, 132, 154*a*; but a verbal contract in which the word *spondeo* was used, and the literal contract by *transscriptio a persona in personam* were confined to citizens, G. iii, 93, 133; and according to the view of Gai. they alone could give or obtain discharge by *nexi solutio* (which see), for it involved a mancipation, G. iii, 174, compared with ii, 65.
4. *In matter of succession.*—It was only a citizen that could make a testament, U. xx, 14, and it was not sustained even to the extent of allowing the heirs in it to have *bonorum possessio secundum tabulas* unless the maker was a citizen at his death, G. ii, 147, U. xxiii, 6, (see *Bonor. poss.*, 11). Except in the case of a *testamentum militare*, G. ii, 110, only a citizen could take anything under a testament,—inheritance, legacy, or *fideicommissum*, G. i, 25, ii, 110, 285, U. xxii, 2; for while a Junian latin might be instituted heir or have a legacy left him, U. xxii, 3, yet he could not take either until he became a citizen, G. i, 23, ii, 110, 275, U. xxii, 3, (though as a latin he might take a *fideicommissum*, G. i, 24, ii, 275, U. xxv, 7). Finally, as none but citizens could be *in potestate*, or be related to other people as agnates (above, No. 1), it was they alone that could succeed *ab intestato*.
5. *In matter of enfranchisement.*—It was only a citizen that could make his slave a citizen by enfranchisement; for he alone could do so who was the slave's quiritarian owner, G. i, 17; and as a slave was a *res Mancipi*, this position, according to Gai., could be held only by a citizen (above, No. 1). Further, the provincial *consilia* for sanctioning manumissions required to be composed of citizens, G. i, 20, U. i, 13*a*, (see *Consilium*).
6. *In matter of witnessing deeds.*—It was only citizens that could act as witnesses of an Aelia-Sentian marriage (see *Aelia-Sentian law*, 6), G. i, 29; of a marriage ceremony by confarreation (see *Manus*, 1), G. i, 112; of a *coemptio* (see *Manus*, 2), G. i, 113; and of a mancipation (which see), G. i, 119. According to Gai., citizens alone could validly witness a testament *per aes et libram*, G. ii, 104; though Ulp. says any one could with whom the testator had *testamenti factio* (which see), U. xx, 2. According to Ulp., even to justify *bon. poss. sec. tab.*, a praetorian testament had to be sealed by seven citizen witnesses, U.



CITIZENSHIP—*continued*.I. PRIVATE RIGHTS AND CAPACITIES OF WHICH CITIZENSHIP WAS A CONDITION—*continued*.

xxviii, 6; but here it is Gai. that omits the qualification of citizen, G. ii, 119.

7. *In judicial procedure*.—A *judicium legitimum* (which see) was possible only when all the parties, judge included, were citizens, G. iv, 104. Further, many judicial remedies were competent directly only to and against citizens; if it was reasonable in the circumstances to grant them to or against one who was not a citizen, this could only be done by introducing into the formula a fiction of citizenship, G. iv, 37, (see *Fiction*, 3).

## II. HOW CITIZENSHIP WAS ACQUIRED AND LOST.

8. *How acquired*.—It usually was acquired by birth, see *Status*, 2. It might be acquired by a slave by manumission according to the requirements of the Aelia-Sentian law, G. i, 17, (see *Manumission*); by a colonial latin by filling office in his *municipium*, G. i, 95 and 96, and note, or by imperial grant, G. i, 93, (see *Colonial latinity*, 2, *Jus Latii*); by a Junian latin in a variety of ways explained in G. i, 28–35, U. iii, 1–6, (see *Junian latinity*, 7); and by a peregrin by *erroris causae probatio* (which see), G. i, 67–75, U. vii, 4, or imperial grant, G. i, 93, (see *Peregrinity*, 8). Such a grant did not carry *potestas* over children already born, or even over an infant *in utero*, unless applied for and expressly included in the concession, G. i, 93, 94, ii, 135*a*, iii, 20.

9. *How lost*.—It was lost not only by any event which made the citizen a slave, as in G. i, 160, U. xi, 11, (see *Slavery*, 1), but by joining a latin colony (see *Colon. latinity*), G. i, 131, or by anything that made him a peregrin, such as interdiction of fire and water, which practically was outlawry, G. i, 128 and n. 2, 161, U. x, 3, xi, 12. Loss of citizenship without loss of freedom was called *capitis deminutio minor* or *media*, *ibid.*, (see *Cap. dem.*, 1).

CLAUDIAN SENATUSCONSULT, the, contained the following provisions in reference to cohabitation of persons of whom one was slave and the other free:—(1.) If a freeman cohabited with another person's slave, believing her free, male issue were to be free, females slave, G. i, 85; Vespasian however repealed the rule, reverting to that of the *jus gentium*,—slave mother, slave child, G. i, 85. (2.) If a woman of free birth continued to cohabit with a *servus alienus* in spite of his owner's warning, she was herself to fall to the latter as a slave, G. i, 91, 160, U.

CLAUDIAN SENATUSCONSULT—*continued*.

xi, 11; but this was not to happen to a freedwoman, for, unless the cohabitation was with her patron's approval, it was to him she became a slave again, U. xi, 27 and n. 2. (3.) Any child born to a freewoman by a slave father of whose condition she was aware,—a circumstance, as Paul. remarks, that made her a slave whether warned or not,—was to be slave-born, G. i, 86 and note. (4.) It was to be lawful for a freewoman, cohabiting with a *servus alienus* with his owner's consent, to bargain with the latter that though her child would be born a slave she was to remain free, G. i, 84; but Hadrian, while still permitting an agreement guaranteeing the mother's freedom, re-established the *juris gentium* rule that in such case the child also must be free, *ibid*.

CODICIL, *codicilli*, (see *Testament*, 26), was an informal expression of last will, which might be made either as supplementary to or in the absence of a testament, G. ii, 270, 270*a*, and in the former case be confirmed by it or not, 270*a*. No institution or disinheritance could in any case be made in it directly, G. ii, 273, U. xxv, 11; if unconfirmed, neither legacies nor direct grants of freedom could be bequeathed in it, G. ii, 270*a*, U. ii, 12, xxv, 8, or adeemed, U. xxiv, 29 and note; but whether confirmed or not, and even in the absence of a testament, a *fideicommissum* might be imposed in it upon the heir to any extent, G. ii, 273, U. xxv, 4, 8.

COEMPTIO, one of the modes of *in manum conventio*, G. i, 113–115*b*; see *Manus*, 2.

COGNATION in its wider acceptance was kinship generally; in its narrower, natural blood relationship as distinguished from the civil or *legitima cognatio* of agnation, G. i, 156. It is often described as kinship through females, *ibid*., but was not so necessarily; for agnates related through males remained cognates even when *capite minuti*, G. iii, 27. By the *jus civile* cognation created incapacities, as in marriage, G. i, 59–62, but conferred no rights. By the rules of succession of the Twelve Tables cognates were ignored, G. iii, 24; but the praetors admitted them to *bonor. poss. ab intestato* immediately after agnates *integri juris*, G. iii, 30, U. xxviii, 7, 9, (see *Bonor. poss.*, 16). For the mode of computing the degrees of cognation, see U. v, 6, note 2.

COGNITOR, see *Procuratory in litigation*, 2.

COGNITORIAE EXCEPTIONES, G. iv, 124; see *Exception*, 10.

**COLLATION.**—It was under condition of collating their acquisitions since they had become *sui juris* by their emancipation, *i.e.* of throwing them into their father's estate for general division, that the praetors granted *bonor. possessio* to emancipated children passed over in a testament in which brothers of theirs *in potestate* had been instituted, U. xxviii, 4, (see *Bonor. poss.*, 7).

**COLONIA LATINA**, a colony established in a province on the understanding that its members were to have the rights enjoyed by the latins of Italy; a citizen joining it ceased to be such, and became a colonial latin, G. i, 131, iii, 56. The charters or acts of constitution of a great many provincial *municipia*, which there was no pretence for calling colonies, gave to their members rights in private life much the same as those of the colonists, G. i, 22, note 1.

**COLONIAL LATINITY**, G. i, 22, note 1.

1. *Rights of colonial latins.*—They had no *conubium* (see U. v, 3, note) with citizens except by special concession, G. i, 56, U. v, 4; and the issue of a colonial latin and a Roman citizen wife was, by the Minician law, a latin like his father, whether there was *conubium* between the parents or not, G. i, 55, 77–79. But the law did not recognise in a colonial latin any right of *manus* or *patria potestas*, at least that could be attended with their *juris civilis* consequences, G. i, 55, 108, 109; although it appears, from the terms of some extant charters of latin *municipia*, that they had a *de facto manus* and *potestas*, G. i, 55, note 2. As regards their right in matters of property, contract, and succession, see *Citizenship*, 2, 3, 4. It does not appear that they had the privilege conferred by the *lex Junia* on Junian latins of taking under a testament if they converted their latinity into citizenship within a hundred days, G. ii, 110, U. xvii, 1, xx, 3.

2. *How they acquired Roman citizenship.*—It was peculiar to them that they could acquire citizenship by what was called *jus Latii*, G. i, 95 and 96, and note. The charters of latin communities conferred upon them sometimes *majus Latium*, sometimes *minus*; where it was the first, a member who had served as a decurion or in higher office not only himself became a citizen, but thereby elevated his parents, wife, and children; where it was the second, citizenship in the same circumstances was confined to himself, G. i, 96. Without this process he might also directly become a citizen by imperial grant, G. i, 93, etc., (see *Citizenship*, 8).

**COMITIA CALATA**, G. ii, 101, U. xx, 2; see *Testament*, 1.

COMMERCIIUM explained in U. xix, 5, note; colonial and Junian latins enjoyed it as well as citizens; and it might be specially conceded to peregrins, U. xix, 4.

COMMODATE, *commodatum*; see also *Real obligations*.

1. *Commodate, what?*—Commodate was loan of a thing for use, to be returned *in specie*. It was not very early recognised as an independent contract, and is not mentioned by Gaius in his reference to obligations created *re*, G. iii, 90 and 91, and note.
2. *Rights of lender*.—Though he had given up the custody of the thing lent, yet the legal possession still remained with the lender, G. iv, 153; and if the borrower, *animo furandi*, used what had been lent in a different way from what had been intended, the lender might proceed against him for theft, G. iii, 196, 197.
3. *Obligations of borrower*.—The borrower had *custodiam praestare*, i.e. to answer for the safety of the thing lent, G. iii, 206; consequently if stolen from him, and he was solvent, it was he that had the *actio furti*, 205, 206.
4. *Special action*.—The action arising out of the contract was the *a. commodati*; in this respect peculiar, that it was sometimes *in jus*, sometimes *in factum concepta*, G. iv, 47, (see *Actions*, 5). When *in jus concepta* it was *bonae fidei* (see *Actions*, 8), G. iv, 47, 62.

COMPENSATION or set-off, *compensatio*, G. iv, 61–68.

1. *In bonae fidei judicia*.—In these (see *Bon. fid. jud.*), and without any instruction in the *formula*, the judge was bound to set off against the pursuer's claim any counter claim of the defender's arising out of the same matter, and condemn the latter only in the balance, if any, G. iv, 61, 63.
2. *In judicia stricti juris*.—By a rescript of Marc. Aurelius' compensation was allowed to be pleaded in answer to *stricti juris judicia* generally, under cover of an *exceptio doli*; see addition to G. iv, 61, note, in *Additions etc.*
3. *In actions by bankers*.—An *argentarius* suing a customer was required formally to set off in his *intentio* (which see) any counter claim of his creditor's, G. iv, 65, if of the same sort as the pursuer's, though not arising out of the same matter, e.g. money against money, wine against wine, 66, if exigible at the moment, 67, on pain of losing his cause altogether, 68.
4. *In actions by bonorum emptores*.—When a *bonor. emptor* or purchaser of a bankrupt's estate (see *Emptio bonorum*) proceeded against a debtor, the latter was entitled to have deducted any counter claim he had against the bankrupt,



COMPENSATION—*continued*.

no matter though for things of a different sort than those he owed, G. iv, 65, 66, and even though not yet due, 67; but this *deductio* was not referred to in the *intentio*, only given effect to in the condemnation, 68.

## COMPERENDINUS DIES, G. iv, 15.

COMPROMISE of a claim, even by simple agreement, entitled the debtor to an *exceptio pacti conventi* if sued in disregard of it, G. iv, 116a. Compromise of an action for theft, robbery, or personal injury, made the delinquent infamous, just as if he had been condemned, G. iv, 182.

CONCUBINE, children of, were not *spurii*, G. i, 64, note 3.CONDEMNATIO, one of the clauses of a *formula*; which see, No. 1.

1. *General purpose*.—It contained the instruction to the judge to condemn or absolve according to the evidence, G. iv, 39; styles, *ibid*. It was necessary in all but prejudicial and probably divisory actions, 44 and note; and when present always stood last, 39, 50.
2. *It was either fixed, taxed, or indefinite*.—Under the earlier system (see *Legis actiones*) an unsuccessful defender was always condemned in the very thing sued for, G. iv, 48 and note 3; but under the formular system condemnation was in all cases in money, G. iv, 48. The amount might either be fixed definitely in the *formula*, *cond. certa*, or be limited to a maximum, *cond. incerta sed taxata*, or be left entirely to the discretion of the judge, *cond. incerta et infinita*, according to the nature of the action, G. iv, 50, 51. It might happen, though unusual, that a *cond. incerta* was the sequel to an *intentio certa*, as when a *bonor. emptor* sued for a definite sum; for then the debtor was entitled before condemnation to have deducted any counter claim of his against the bankrupt, (see *Compensation*, 4), G. iv, 68.
3. *What if the praetor had put too great or too small a sum in a condemnatio certa?*—In the former case the pursuer obviously was not prejudiced, but the defender was entitled to *in integrum restitutio* (which see) in order to get the *formula* amended, G. iv, 57; in the latter the pursuer had in general to take the consequences, *in integrum restitutio* being refused unless he was a minor, *ibid*.
4. *Cases in which the condemnatio ran in another name than the intentio*.—The *condemnatio* always contained not only the name of the party who was to be condemned, but also that of him to whom he was to be condemned in the event of the action not ending in acquittal; but those names were not necessarily the same as in the *intentio*

CONDEMNATIO—*continued*.

(which see). If a *bonorum emptor* sued by the Rutilian action, he took the *intentio* in name of the bankrupt as the party to whom the defender was really indebted, but the *condemnatio* in his own, G. iv, 35; and if either suit or defence was conducted by a tutor or curator, *cognitor* or procurator, (see *Procuratory in litigation*), it was the principal's name that appeared in the *intentio*, the agent's in the *condemnatio*, G. iv, 86.

5. *Judge's duty in regard to the condemnatio*.—See *Procedure*, 10.

CONDICERE, meaning of, G. iv, 17*b*.

CONDICTIO was the generic name for a personal action in which the *intentio* (which see) embodied either *dare oportere* or *dare facere oportere*, G. iv, 5, the meaning of those words being explained in G. iv, 2, note 3; the first was *condictio certi*, the second *condictio incerti*, *ibid*. As a general rule a *condictio* was inapplicable where a man was claiming his own,—he could not maintain that another was bound to give him in property what was already his; but exceptionally it was allowed against thieves in the *condictio furtiva*, G. ii, 79, iv, 4, (see *Theft*, 7), and against other *malae fidei* possessors in one or two cases unspecified, G. ii, 79. On *condictio indebiti* in particular, see *Indebiti solutio*.

CONDITIONEM, LEGIS ACTIO PER, G. iv, 17*b*–20; see *Legis actiones*, 4.

CONDITION.—The phraseology was—*condicio pendet*, G. i, 186, ii, 200, iii, 179, while fulfilment or failure was still in the future; *cond. exstitit*, G. iii, 179, or *expleta est*, U. ii, 5, when it had been fulfilled; *cond. defecit*, G. iii, 179, when it had failed.

1. *Conditions in contracts*.—Sale and location might both be conditional, G. iii, 146, and so might a stipulation, 102, 113. But while a conditional answer to an unconditional question was useless (see *Stipulation*, 5), G. iii, 102, it was quite competent in adstipulation to make the second stipulation conditional though the first was pure, *i.e.* unconditional, (see *Adstipulation*, 1), G. iii, 113. The *ex intervallo* introduction of a condition was such a change in an obligation as to amount to novation (which see, No. 4) if the condition was fulfilled, though not if it failed, G. iii, 177, 179.

2. *Conditions in testaments*.—An heir might be instituted under a condition; if it failed, and he was sole heir without a substitute (see *Substitution*, 1), the result was intestacy, G. ii, 144. Any testamentary provision might be conditional,—a legacy, U. xxiv, 31, a trust gift, G. ii, 250, the enfranchisement of a slave, U. ii, 1, or the appoint-

CONDITION—*continued*.

ment of a tutor, G. i, 186; and in all these a *dies incertus* was regarded as a condition, U. xxiv, 31 and note. As a conditional legacy did not vest until the condition was fulfilled or the *dies incertus* had come, *ibid.*, there was a nice question as to the ownership *pendente condicione* of a legacy bequeathed per *vindicationem* (see *Legacy*, 21), G. ii, 200.

3. *Impossible conditions*.—A contract under an impossible condition was a nullity, G. iii, 98. When such a condition was annexed to a legacy, the Sabinian view was that the legacy was to be held valid, and the condition regarded as unwritten; the Proculians, however, maintaining that the rule should be the same as in contract, *ibid.*

4. *Defeat of a condition by a party interested in its failure*.—When this happened—as when a slave had a testamentary gift of freedom on condition of paying a certain sum to the heir, and the latter would not accept it—the condition was regarded as fulfilled, U. ii, 6.

CONFARREATION, G. i, 112, U. tit. ix; see *Manus*, 1.

CONFISCATION of the estate of a partner in strictness put an end to the partnership, (which see, No. 3), G. iii, 154.

CONJOINT and DISJOINT LEGACY to co-legatees, G. ii, 199; see *Legacy*, 30–34.

CONSANGUINEI defined, U. xxvi, 1; *consanguineorum gradus*, G. iii, 14, 23, 29, U. xxvi, 6; *consanguinitatis jura*, G. iii, 24 and note 1. See *Intestate succession*, 4.

CONSENSUAL OBLIGATIONS (see *Contract*, 1) were so called because a common understanding was sufficient to create them without any formality, G. iii, 136; consequently they might be contracted even between persons at a distance from each other, by the medium of a letter or a messenger, *ibid.* They arose from the four contracts of sale, location, partnership, and mandate, (see those words), G. iii, 135; the parties to them each becoming bound for what in the circumstances he ought to do in fairness and equity, 137.

CONSILIIUM, the, that sat to consider questions of manumission (which see, Nos. 2–4, 6) was composed in Rome of five senators and as many knights; in the provinces, of twenty recuperators, Roman citizens, G. i, 20, U. i, 13a.

CONSOBRINI, G. iii, 10 and n. 1.

CONSTITUTIONES PRINCIPUM were enactments of the emperors (see *Statute*, 1), in the form either of decrees, edicts, or epistles, G. i, 5 and note 1, and were held to have the force of *leges* in consideration of the *imperium* vested in the sovereign, *ibid.* The following are specially mentioned:—

CONSTITUTIONES PRINCIPUM—*continued.*

*Antoninus Pius.* Rescript (?) regarding the punishment to be awarded to an owner killing his slave, (see *Slavery*, 2), G. i, 53; rescript denouncing unnecessary cruelty to a slave, *ibid.*; rescript about *erroris causae probatio* by a peregrin, (see *Error. c. prob.*), 74; epistle about adrogation of pupils, (see *Adoption*, 5), 102, U. viii, 5; rescript about a legacy of a Junian latin to a colony, (see *Succession to Junian latins*, 2), G. ii, 195.

*Augustus.* Enactment allowing a soldier *filiusfamilias* to dispose of his *peculium castrense* by testament, U. xx, 10, (see *Soldier, Testament*, 6, 25).

*Caracalla*, (*imperator Antoninus* in text). Enactment giving *caduca* to fisc, U. xvii, 2, (see *Caducuity*, 5).

*Claudius.* Edict declaring that a latin might acquire citizenship *nave*, G. i, 32c, U. iii, 6, (see *Junian latinity*, 7).

*Hadrian.* Rescript regulating the *responsa prudentium* (which see), G. i, 7; edict on subject of petitions by peregrins for grants of citizenship, (see *Citizenship*, 8), G. i, 55, 93; rescript about *erroris causae probatio* (which see), G. i, 73; enactment modifying the Claudian Sct. (which see), G. i, 84; rescript as to effect of grant of citizenship to a peregrin, (see *Patria potestas*, 12), G. i, 94; rescript (?) exceptionally allowing *in integrum restitutio* to a man above twenty-five who had in excusable ignorance taken an insolvent inheritance, (see *In integrum restitutio*), G. ii, 163; rescript (?) about legacies by preception to others than heirs, (see *Legacy*, 28, 29), G. ii, 221; rescript as to interest on legacies and trust-gifts when heir *in mora* (which see), G. ii, 280; epistle conferring *beneficium divisionis* upon sureties (see *Suretyship*, 4), G. iii, 121, 121a, 122.

*Marc. Aurelius.* Enactments that an institute with imperfect cretion should totally exclude substitute by simple *gestio pro herede*, (see *Cretio*, 3), U. xxii, 34; rescript (attributed in the text to *imp. Antoninus*) allowing instituted heirs under an imperfect testament, who had obtained *bonorum possessio*, to plead *exceptio doli* to any attempt of the agnate heirs-at-law to eject them, (see *Bonorum possessio*, 12), G. ii, 120; rescript (attributed in text to *imp. Antoninus*, and by Just. in l. 4, C. de lib. praet. vi, 28, to *Magnus Ant.*,—inapplicable to *Ant. Pius*) limiting *bonor. possessio* granted to females *practeritae* to the amount they were entitled to by *adcretio*, (see *Bonorum possessio*, 9), G. ii, 126; rescript (attributed in text to *imp. Antoninus*) allowing heir under a testament partially obliterated or otherwise defaced to plead *exceptio doli* against heirs-at-law



CONSTITUTIONES PRINCIPUM—*continued*.

obtaining *bonor. possessio ab intestato*, (see *Bonor. possessio*, 12), G. ii, 151; edict (?) allowing minors to have curators in other than the exceptional cases of the Plaetorian law, (see *Curatory*, 3), G. i, 197, note; rescript allowing compensation to be pleaded in answer to *stricti juris* actions, addition to G. iv, 61, note, in *Additions etc.*

*Nero* (?). Edict (?) conferring citizenship on latins *aedificatione*, G. i, 33 and note, (see *Junian latinity*, 7).

*Nerva*. Enactment about legacies bequeathed to municipalities, U. xxiv, 8, (see *Legacy*, 6).

*Trajan*. Edict (?) as to acquisition of citizenship by a latin *pistrino*, (see *Junian latinity*, 7), G. i, 34; rescript (?) in regard to grants of citizenship to latins either *salvo jure patroni* or without consent of patrons, (see *Succession to Junian latins*, 5), G. iii, 72.

*Vespasian*. Enactment modifying the Claudian Sct. (which see), G. i, 85.

*Authorship unknown*. Constitution granting indefinite *convivium* to discharged soldiers, (see *Soldiers*), G. i, 57; about marriage between cousins, (see *Marriage*, 4), G. i, 62; on the *jus Latii*, (see *Colonial latinity*, 2), 96; about military testaments, (see *Testament*, 25), G. ii, 109; relaxing the prohibition of donations between husband and wife, (see *Husband and wife*, 5), U. vii, 1; allowing certain divinities to be instituted as heirs, (see *Testament*, 13), U. xxi, 6.

CONSTITUTUM, acknowledgment of indebtedness, actionable as a praetorian pact: a natural obligation was sufficient foundation for it, G. iii, 119*a*, note 1.

CONSUETUDE, see *Custom*.

CONSUMPTIO ACTIONIS, exhaustion of a right of action by its *ductio in judicium*, i.e. by adjustment on it of a *formula* and transmission of the latter to a judge for trial, G. iv, 131, 131*a*; see *Litis contestatio*.

CONTRACT, one of the modes of creating an obligation (which see), G. iii, 88.

1. *Varieties*.—There were four varieties—the contracts *re*, *verbis*, *litteris*, and *consensu*, giving rise to the so-called real, verbal, literal, and consensual obligations, G. iii, 89, (see those words). The innominate contracts in one or other of the forms *do ut des*, *do ut facias*, *facio ut facias*, *facio ut des*, were regarded as real, *ibid.*, note 1. The obligations created by the verbal and literal contracts were unilateral, while those arising out of the consensual ones were bilateral or mutual, G. iii, 137.

2. *Difference between contract and pact*.—See *Obligation*, 2.

CONTRACT—*continued*.

3. *Formal contracts*.—The contracts *verbis* and *litteris* were formal contracts, *i.e.* if the prescribed form was gone through liability was in law created, although equity might give relief, G. iii, 89, note; *e.g.* if a stipulatory promise was made to pay a certain sum in consideration of an expected loan, the promise was binding even though the loan was not advanced, but might be rendered ineffectual by an *exceptio doli mali*, G. iv, 116. The *nexum* and *jusjurandum* of the early law (see those words) were of the same class, G. iii, 89, note.
4. *Useless contracts*.—Many of the circumstances that Gai. refers to as rendering a stipulation useless, and which are placed under that head in deference to his example, were applicable to contracts generally; see *Stipulation*, 3–5.

CONTRARIUM JUDICIUM, G. iv, 177; see *Vexatious litigation*.

## CONUBIUM.

1. *What meant by it*.—See explanation in U. v, 3, note.
2. *Who had it inter se*.—Roman citizens had it with citizens, but not with latins or peregrins except by special concession, G. i, 56, U. v, 4. Veterans, who had obtained honourable discharge, occasionally obtained an indefinite concession of it, empowering them to marry any latin or peregrin woman as if she were a citizen, G. i, 57. But there could be no *conubium* with a slave, U. v, 5.
3. *Consequences of its presence*.—The rule was that where a man married a woman with whom he had *conubium*, the issue followed the condition of their father,—were citizens or peregrins according as he was one or other, G. i, 56, 76, 77, U. v, 8; but whereas, if he was a citizen, the marriage was *justum matrimonium* (see *Marriage*, 1), and his children *in potestate*, G. i, 56, 76, if he was a peregrin the marriage was only a peregrin marriage, and his children, though lawful, were not in his *potestas*, 77.
4. *Consequences of its absence*.—The rule of the *jus gentium* was that in the absence of *conubium* a child followed the condition of its mother, G. i, 78, U. v, 8; but was altered by the Minician law, which provided that the issue of parents of unequal status, who had not *conubium*, should invariably follow the lower, *ibid.* Hadrian subsequently enacted that if a Roman woman married a Junian latin, whether under the Aelia-Sentian law or not—there was no *conubium* between citizens and Junian latins, G. i, 80—her children should be citizens, *ibid.* See *Status*, 2.

CONVENTIO IN MANUM, see *Manus*.

CONVENTUS or provincial assizes, G. i, 20 and n. 2.

CORPOREALS, G. ii, 13; see *Things*, 4.

CREDERE, etymology, G. iii, 92, note.

CREDITA PECUNIA defined, G. iii, 124.

CRETIO, G. ii, 164–173, U. xxii, 25–30; see also *Hereditas*, 5.

1. *Cretio, what?*—Cretion was a period formally limited in a testament for the heir's entry, G. ii, 164, 165, U. xxii, 27, failure being sometimes under penalty of disinheritance (*perfecta cretio*), *ibid.*, sometimes merely under penalty of admission of a substitute (*imperfecta cretio*), G. ii, 177, U. xxii, 34.
2. *Cerniture, what?*—Cerniture in compliance with the cretion-clause was a formal declaration of acceptance of the inheritance, in presence of witnesses, and in well-established words of style, G. ii, 166 and note, U. xxii, 28; and it required to be made before the time limited, usually a hundred days, had expired, G. ii, 166.
3. *Were equivalents possible?*—Where the cretion was perfect, informal declaration or *gestio pro herede* could not be admitted as equivalents, G. ii, 168; but in imperfect cretion *gestio pro herede* entitled the institute at first to retain a half of the succession, G. ii, 177, and afterwards the whole of it, U. xxii, 34.
4. *Vulgar and continuous cretion.*—These are distinguished in G. ii, 171–173, U. xxii, 31, 32.

CRETIO LITIS INFITATIONE.—To check vexatious litigation an unsuccessful defender was sometimes condemned in double the amount of his normal liability as the penalty of his denial, G. iv, 171, *e.g.* in the *a. judicati* and *a. depensi*, G. iv, 9, 171, (see those words); in the action for a legacy by damnation (see *Legacy*, 22, 23), G. iii, 282, iv, 9, 171; and in the Aquilian action against an adstipulator (see *Adstipulation*) who had accepted in fraud of the stipulant, G. iii, 215, 216, iv, 9, 171. But the penalty was not incurred where the defence was by the heir of the original debtor, G. iv, 172. See *Vexatious litigation*, 1.

CURATORY, *curatio*, G. i, 197, 198, U. tit. xii.

1. *Curatory of lunatics and prodigals.*—The Twelve Tables enacted that lunatics, and prodigals who had been interdicted the administration of their estates because they were dissipating the patrimony to which they had succeeded *ab intestato*, should be in curatory of their agnates, U. xii, 2; and the praetors gave curators of their own selection to freedmen spendthrifts, and to those free-born ones who had succeeded to a family property *ex testamento*, neither of those classes being included in the provision of the statute, U. xii, 3.

CURATORY—*continued*.

2. *Duties and powers of such curators*.—Latterly those of them who took the office by devolution of law were required to give security, *satisfactio*, for the faithful discharge of their duties, G. i, 200; their powers—at least those of the agnatic curator of a lunatic—extended even to the alienation of the estate, G. ii, 64; and they might sue or be sued on account of their wards, giving the same securities as required from procurators, G. iv, 82, (see *Procuratory in litigation*, 2).

3. *Curatory of minors*.—By the Plaetorian law the praetor was authorised in certain cases to appoint tutors to minors (see *Minority*), G. i, 197 and note; and Marc. Aurelius afterwards withdrew the limitation to certain cases and authorised it generally, *ibid.*, U. xii, 4. Such curators were not required to give security, their qualifications having been approved beforehand, G. i, 200.

CUSTOM, *mores, consuetudo*, a factor in every system of law, G. i, 1, resting on tacit acceptance by the nation, U. i, 4, G. iii, 82. Among the institutions due to it are mentioned the universal acquisitions by *manus* (which see) and *adrogatio* (see *Adoption*, 8), G. iii, 83, certain tutories, U. xi, 2, 24, and one or two cases of procedure *per pignoris capionem* (see *Legis actiones*, 6), G. iv, 27.

DAMAGE TO PROPERTY, WRONGFUL, G. iii, 210–19; see *Wrongful damage to property*.

DAMAGES, see *Interesse*, *Wrongful damage to property*, 1, 3.

DAMNAS ESTO, a phrase employed in statutes and private deeds, such as testaments, to impose a liability, G. ii, 201 and n. 1, iii, 210, note 2, U. xxiv, 5; the party thereby made debtor was called *damnas* (indeclinable) or *damnatus*, G. ii, 201, note 1, iii, 175 and note 3; and by the XII Tab. summary execution by *manus injectio* (see *Legis actiones*, 5) was authorised against him on the strength of the *damnatio*, G. iv, 21, though the Vallian law afterwards gave him some relief, G. iv, 25. If the creditor desired to give the debtor a discharge without payment, he had to do so *per aes et libram*, G. iii, 175, (see *Nexi solutio*).

DAMNATI, DAMNATIO, see *Damnas esto*.

DAMNATIONEM, LEGATUM PER, see *Legacy*, 22–24, 32, 34.

DAMNUM, DAMNUM DECIDERE, G. iv, 37, note 6.

DAMNUM INFECTUM, G. iv, 31 and notes.

DAMNUM INJURIA DATUM, see *Wrongful damage to property*.

DAPS, G. iv, 28 and note 2.

DARE, technical meaning, G. iii, 92, note, iv, 4.



DARE, FACERÉ, PRAESTARE, G. iv, 2 and note 3.

DEAF PERSON, *surdus*, could not be a party to a stipulation, G. iii, 105; nor could he validly execute a testament *per aes et libram*, U. xx, 13, or assist at the execution of another person's as *familiae emptor*, witness, or balance-holder, U. xx, 7.

DECIMAE, tenths of the estate of husband or wife, one or more of which the survivor was empowered by the Julian law to take in certain circumstances under the other's testament, U. xiv, 1, 2 and note; see *Julian and Pap. Popp. law*, 6.

DECRETUM (PRINCIPIS), a form of imperial enactment, G. i, 5, note 1, (see *Constitutiones principum*); *decretum praetoris*, a form of interdict, G. iv, 140, (see *Interdicts*, 1).

DEDITICIAN FREEDMEN, *liberti qui dediticiorum numero sunt*.

1. *Origin of this class*.—It was a provision of the Aelia-Sentian law (which see, No. 3) that slaves who had deservedly been subjected to disgraceful punishment should not become citizens on manumission, but rank with those peregrins who after defeat had surrendered to Rome unconditionally, G. i, 13, 14, U. i, 11; the only exception being in the case of one who was instituted necessary heir with freedom in the testament of his insolvent owner, (see *Necessarii heredes*), U. i, 14.

2. *Disabilities of a deditician*.—He could never in any way become a citizen or even a latin, G. i, 15, 26; and was forbidden to reside within a hundred miles of Rome, under penalty of reduction again to perpetual slavery, G. i, 27. As nothing more than a peregrin he could neither make a testament, G. i, 25, iii, 75, U. xx, 14, nor have any interest in that of another person, G. i, 25, U. xxii, 2. Yet though only a peregrin he might possibly be husband and father of citizens, viz. when a citizen woman had married him believing he was a citizen, and on discovering her mistake proved cause of error (see *Erroris causae probatio*), and thus made her children citizens, G. i, 67, 68; over them, however, the deditician father had no *potestas*, *ibid*.

3. *Disposal of his estate on death*.—If, but for the stain on his character, he would have been a citizen on manumission, his estate belonged to his patron according to the rules of succession to citizen freedmen, (see *Succession to cit. freedmen*), G. iii, 75; but if, by reason of the form of his manumission, he would, but for the stain, have been a latin, it went to the manumitter and his heirs, according to the rules of succession to latin freedmen, (see *Succ. to Jun. latins*), G. iii, 76.

DEDUCTIO in action by *bonorum emptor*, G. iv, 65–68; see *Compensation*, 4.

DELATIO HEREDITATIS, see *Hereditas*, 1, 2.

DELEGATIO, G. iii, 130; see *Novation*, 3.

DELIBERANDI TEMPUS, time allowed to a stranger heir to consider whether it was for his advantage to accept an inheritance, G. ii, 162; see *Hereditas*, 6.

DELICT was one of the sources of obligation, G. iii, 88, 182; (see also *Obligation*, 2).

1. *Varieties*.—There were four nominate delicts, *furtum*, *vis bonorum raptorum*, *damnum injuria datum*, *injuria*, G. iii, 182, (see *Theft*, *Robbery*, *Wrongful damage to property*, *Personal injury*); but all were of the same genus, there being no delict where there was no *res*, *i.e.* no act done, *ibid.*
2. *Delicts of persons alieni juris*.—A wrong done by a *filius-familias* or slave to his *paterfamilias* or owner gave the latter no action *ex delicto*, obligation between them being impossible, G. iv, 78; but for delicts committed by them against strangers the *paterfamilias* was responsible in noxal actions (which see), 75.
3. *How far heirs affected*.—The heir of a delinquent was not liable in the penal action *ex delicto*, G. iv, 112; but the heir of the party wronged was entitled to sue, except in the *a. injuriarum*, *ibid.*

DELIVERY, *traditio*, see *Property*, 5.

DEMONSTRATIO, one of the clauses of a *formula*, G. iv, 39; see *Formula*, 1.

1. *Its purpose and position*.—When present it stood first, its purpose being briefly to explain what had given rise to the action, G. iv, 40; styles, 40, 47, 59, 136. It required to be followed with an *intentio* and *condemnatio* (see those words), 44, except when an *adjudicatio* (which see) came in place of the latter, 44, note.
2. *When necessary*.—In *formulae in jus conceptae* it was introduced only when the claim was illiquid, and the *intentio* in the style '*quidquid ob eam rem illum illi dare facere oportet*,' G. iv, 60; such a *formula* was called *incerta*, 54, 131. In *formulae in factum conceptae* the *demonstratio* was in a manner amalgamated with the *intentio*, 47, 60.
3. *Introduction of restrictive words*.—Where a *demonstratio* was present it was competent to introduce into it a '*cujus rei dies fuit*' or such like, which in a *formula* without a *demonstratio* was made matter of prescription, G. iv, 136, (see *Praescriptio*).
4. *What if too much or too little demonstrated?*—If a man in

DEMONSTRATIO—*continued*.

his *demonstratio* condescended on too much or too little, his action was resultless, but—differing from the rule in regard to the *intentio*, G. iv, 53, 56—his claim remained intact, 58; at least this was the opinion of Gai., although to some extent not shared by other jurists, 59, 60.

DEPENSUM, see *Actio depensi*, *Suretyship*, 5.

DEPOSIT, *depositum*, is not mentioned by Gai. in his description of the *obligatio re contracta*, G. iii, 90 and 91, note.

1. *Nature of the contract*.—The deposit still left the legal possession in the depositor, the depositary being merely his agent in possessing, G. iv, 153.
2. *Obligations of the depositary*.—If, *animo furandi*, he used what was deposited with him, he committed theft, G. iii, 196. He was bound to give it back to the depositor on demand; but he was liable in damages on failure only when attributable to dole on his part,—he was not responsible for careless keeping, whereby it had been stolen, G. iii, 207. Therefore, unlike a borrower, 205, 206, he had not an *actio furti* against the thief; the depositor was alone entitled to it, 207.
3. *The actio depositi*.—This was one of the actions which exceptionally might be formulated either *in jus* or *in factum*, G. iv, 47, 59, 60; styles, 47. When *in jus concepta* it was *bonae fidei*, 62. Condemnation of the depositary made him infamous, 60.

DEROGATIO LEGIS, partial repeal of a statute, U. i, 3.

DIANA OF THE EPHESIANS, U. xxii, 6.

DIES, a date at which a right was to become operative,—money to be payable under a contract, G. iii, 124, a legacy, or a trust-gift, or a tutor's appointment under a testament, G. i, 186, ii, 250, U. xxiv, 31. The date might be either *certus* or *incertus*; in testaments a *dies incertus* was regarded as a condition, U. xxiv, 30 and 31, note. The *ex intervallo* introduction of a date into an obligation, or withdrawal of one from it, amounted to novation (which see, No. 4), G. iii, 177; the reason being that a postponed debt counted for less than one immediately exigible, G. iii, 113.

DIES LEGATI CEDEBAT, *i.e.* a legacy vested, under the old law at the testator's death. By the Julian and Pap.-Poppaeian law it vested on the opening of the testament, if it was either pure or *in diem certum*; if conditional or *in diem incertum*, only on the condition happening or uncertain date arriving, U. xxiv, 31. If a legatee survived the *dies cedens*, his right passed to his heirs, 30.

DIES NEFASTUS,—a *legis actio* (which see) could not proceed upon it, G. iv, 29.

DII SUPERI, DII MANES,—things consecrated to them were respectively sacred and religious, G. ii, 4. A few specially favoured deities might be instituted heirs in a testament, U. xxii, 6. The *fana deorum* were regarded as sanctuaries, G. i, 53.

DILATORY EXCEPTIONS, G. iv, 122; see *Exception*, 5.

DISHERISON, see *Testament*, 10–12.

DISJOINT and CONJOINT LEGACY to co-legatees, G. ii, 199; see *Legacy*, 30–34.

DISPENSATOR, G. i, 122, iii, 160.

DIVERSAE SCHOLAE AUCTORES, a phrase used by Gaius to denote the Proculians; see *Sabinians and Proculians*.

DIVINI JURIS, things that were, G. ii, 3–9; see *Things*, 1.

DIVISIONIS, BENEFICIUM, G. iii, 121; see *Suretyship*, 4.

DIVORCE, *divortium*, *repudium*, see *Husband and wife*, 6.

DODRANS, in matter of testaments, three-fourths of a testator's estate, and in particular the three-fourths which legatees might take under the Falcidian law, U. xxv, 14; see *Legacy*, 16.

DOLUS, DOLUS MALUS, intent to injure or defraud, or knowingly taking advantage of what caused that result, G. ii, 215; iii, 197, 207, 211; iv, 47. *Doli mali exceptio*, see *Exception*, 8.

DOMESTICUM TESTIMONIUM was not allowed in testaments, G. ii, 105–108, U. xx, 3–6.

DOMINICA POTESTAS, see *Slavery*.

DOMINIUM, see *Property*.

DONATION beyond a certain amount was prohibited by the Cincian law except to near kinsmen, U. i, 1; between husband and wife it was generally invalid, (see *Husband and wife*, 5), U. vii, 1.

DOTIS DICTIO, a particular mode of constituting a dowry, U. vi, 2, G. iii, 96 and note; see *Verbal obligation*, *Dowry*, 1.

DOWRY, *dos*, U. tit. vi, was the contribution made by or on behalf of a wife, who was not passing *in manum mariti*, towards the support of the *onera matrimonii*. See also *Husband and wife*.

1. *How and by whom constituted*.—There were three modes of constituting it,—*dotis datio*, instant transfer, U. vi, 1; *dotis dictio*, specification of it in a formal way, which was held to amount to a verbal obligation (which see), though not contracted by way of question and answer, G. iii, 96 and note, U. vi, 1; and *dotis promissio*, in the shape of an ordinary stipulation (which see), U. vi, 1. Any person could give or promise a dowry, U. vi, 2; but it was only



DOWRY—*continued.*

the woman herself, a male ascendant related through males, or a debtor of hers acting on her instructions that could constitute it by *dictio*, G. iii, 96, U. vi, 2. If the woman was constituting it herself, her tutor, even her patron, was obliged to give his *auctoritas*, G. i, 178, 180; and if he was incapable, she got an interim Atilian tutor for the purpose, 178.

2. *Varieties.*—It was *profecticia* when constituted by the woman's father, U. vi, 3; *adventicia* when it proceeded from some other quarter, *ibid.*; or *recepticia*, when, being adventitious, the party advancing it had bargained that it was to revert to him on the dissolution of the marriage, U. vi, 5.
3. *The husband's right in it.*—While the marriage lasted the husband was legally its owner, G. ii, 63; but he was thus far under disability, that the *lex Julia de adulteriis* forbade him to alienate lands belonging to it, at least *italica prædia*, *ibid.* and n. 1. He might bequeath any part of it to his wife, U. xv, 3; which entitled her to claim it the moment an heir entered under his will, instead of having to wait for it. For, if there was no agreement to the contrary, the rule was that, when it came to be returned, the husband or his heirs did so in three annual instalments, so far as money or other fungibles were concerned, U. vi, 8, non-fungibles, however, being restored at once, *ibid.*
4. *Its fate on the predecease of the wife.*—The *dos profecticia* then reverted to her father if he was alive, but under deduction of a fifth for each child of the marriage until exhausted, U. vi, 4. If the father was dead, the husband retained the whole, *ibid.* A *dos adventicia* he was also entitled to retain, U. vi, 5, unless it was *recepticia*, and then it reverted to the party who had advanced it, *ibid.*
5. *Its fate on divorce.*—The wife, if *sui juris*, was then entitled to sue for it, whether profectitious or adventitious, U. vi, 6; if a *filiafamilias* her father sued along with her, *ibid.* If she died after the divorce, her heirs had no action for it unless her husband had been *in mora* in returning it, according to the practice explained above, 7.
6. *The husband's rights of retention.*—The husband had various rights of retention. Thus, when divorce was due to the fault of the wife or her *paterfamilias*, the husband was entitled to retain one-sixth for each child of the marriage, but not more than one-half in all, U. vi, 10, 11. Where his wife had been guilty of adultery he retained another

DOWRY—*continued*.

sixth, or an eighth if her misconduct had been less serious, 12. (If he himself had been guilty of immorality, he was punished by being required to restore fungibles at once, and pay besides a sum equal to three years' income of non-fungibles, 13.) He was also entitled to retention for outlays on the dotal estate (see *Impensae*), 9, 14–17; for gifts made by him to his wife, 9, donations between them being as a rule prohibited, (see *Husband and wife*, 5), U. vii, 1; and for the value of property of his theftuously carried off by his wife in prospect of divorce, U. vi, 9.

7. *The actio rei uxoriae*.—See this head under *Actions*.

8. *Caducous dowry*.—See *Caducity*, 6.

DUPLICATION, G. iv, 127; see *Replication*.

DUPUNDIUS, G. i, 122.

EDICTA MAGISTRATUUM, G. i, 6; see *Jus Romanorum*.

EDICTUM IMPERATORIS, a form of imperial enactment, G. i, 5 and note 1; see *Constitutiones principum*.

EDICTUM SUCCESSORIUM, that portion of the praetor's edict which regulated the matter of succession testate and intestate, U. xxviii, 12.

EMANCIPATION, exclusion or release of a *filiusfamilias* from the *patria potestas* (which see), G. i, 132–135a.

1. *How effected*.—When a *paterfamilias* mancipated (see *Mancipation*, 1) his daughter or his grandchild *in potestate* to a third party, and the latter manumitted her or him (see *Manumission*) from the quasi-slavery created by the mancipation (see *Mancipii etc.*, 3), the daughter or grandchild at once became *sui juris*, G. i, 132, U. x, 1; but in the case of a son, the Twelve Tables (which see, No. 2) required three mancipations to free him from the *potestas*, and as many manumissions to make him a *paterfamilias*, *ibid.* Noxal surrender of a son (see *Noxal actions*) was not equivalent to emancipation, the mancipation being performed only once, G. iv, 79.

2. *Results for the emancipated child*.—Becoming *sui juris*, the child acquired all the rights incident to that position, (see *Sui juris personae*). But as the emancipation involved *capitis deminutio* (which see, No. 2), according to the *jus civile* he lost all right of succession to his emancipating parent or to those who had been his agnates, G. iii, 19, 21; his parent was not bound to institute or disinherit him, G. ii, 135, U. xxii, 23; if he was instituted, he took as a stranger heir (see *Extranei heredes*), not as a *suus*, G. ii, 161. By the praetorian edict, however, if his parent passed

EMANCIPATION—*continued*.

him unmentioned in his testament, he was entitled to *bonorum possessio contra tabulas*, on condition of collating with *sui*, G. ii, 135, U. xxii, 23, xxviii, 2, 4, (see *Bonor. poss.*, 7); on his parent's intestacy he was admitted to *bonor. poss. ab int.* along with *sui*, G. iii, 26, U. xxviii, 8; and he might, as a cognate, claim possession of the estate of one who, but for the *capitis deminutio*, would have been his agnate, G. iii, 27, U. xxviii, 9.

3. *Results for the parent and third parties*.—If the parent died before completing a son's emancipation, the latter's manumission from his first or second mancipation invalidated his parent's testament by *quasi agnatio sui*, (see *Agn. sui heredis*), even though he might be instituted in it or disinherited, G. ii, 141, U. xxiii, 3; or, if the parent was intestate, entitled him to succeed, as again become a *suns heres*, G. iii, 6. The manumitter was entitled, as quasi-patron, to be the child's tutor G. i, 166, U. xi, 5; but the parent, in order to reserve this right, usually had the child remancipated to him and himself became the manumitter, G. i, 133, 172. As *parens manumissor* and quasi-patron he was entitled not only to be tutor of but to succeed to his emancipated child dying without issue, G. i, 133, iii, 40, 41, U. xxviii, 7 and n. 1, as amended in *Additions etc.*
4. *Emancipation of an adopted child*.—When this happened the child was regarded as if in fact emancipated by his natural parent, G. ii, 137, and ceased to have any rights in relation to the adoptive parent's succession, G. ii, 136, U. xxviii, 3.

EMERE and EMPTIO, early meaning, G. i, 113, note 2, ii, 104, note 6, U. xix, 5, note.

EMPHYTEUSIS,—the name is not in Gai., but of later date,—grant of lands to a man and his heirs *in perpetuum*, so long as the *vectigal* was regularly paid, G. iii, 145. It was a question whether the contract was sale or location; but held to be the latter, *ibid.*

EMPTIO BONORUM, G. iii, 77–81, the last stage of the bankruptcy procedure introduced by Publ. Rutilius, G. iii, 77, note, iv, 35.

1. *To what estates it applied*.—It applied to the estates of insolvent debtors, whether living or dead, G. iii, 78: living ones, if they either fraudulently kept out of the way of their creditors and were undefended in the latter's actions, or had made a *cessio bonorum*, or had failed to pay a judgment debt within the days of grace, *ibid.*; dead, when it became clear that they were without heirs, *ibid.*

EMPTIO BONORUM—*continued*.

2. *Procedure*.—The creditors were first put by the praetor into possession, *in possessionem missi*, of the estate of the bankrupt, and then the proceedings were publicly advertised, a trustee (*magister*) elected, and the estate knocked down by him to the highest bidder; those various steps being at intervals longer or shorter, according as the debtor was living or dead, G. iii, 79 and n. 8.
3. *Position of the bonor. emptor*.—His purchase amounted to an acquisition of the estate *per universitatem*, G. ii, 98. His right, however, was praetorian only; his ownership of its corporeal items therefore was in the first instance bonitarian (see *Bonitar. ownership*), convertible into quiritarian by usucapion, G. iii, 80. Debtors of the bankrupt's he sued either by an *actio Serviana* on a fiction of heirship (see *Fiction*, 1), G. iii, 81, iv, 35, or by the *a. Rutiliana*, with *intentio* in name of the bankrupt and *condemnatio* in his own, (see *Condemnatio*, 4), G. iv, 35. A debtor sued by him was entitled to deduction of all counter claims of whatever sort, and even though not yet exigible, (see *Compensation*, 4), G. iv, 65–68.
4. *Result for the bankrupt*.—See *Bankruptcy*.

EMPTIO HEREDITATIS, in, heir and purchaser exchanged *stipulationes emptae et venditae hereditatis*, the heir undertaking to transfer to purchaser everything belonging to the inheritance that might come into his hands, and to allow latter to prosecute all claims as his, the heir's, procurator, (see *Procuratory in litigation*, 4), and the purchaser undertaking to defend the heir in all actions, and relieve him of all judgments, G. ii, 252. (This must not be confounded with *in jure cessio hereditatis*, described in G. ii, 34–37, iii, 85–87, U. xix, 12–15, and under *Hereditas*, No. 15.)

EMPTIO VENDITIO, see *Sale*.

ENTAIL created by series of testamentary trusts, G. ii, 277 compared with 271; see *Fideicommissum*, 5.

EPISTULA HADRIANI introducing *beneficium divisionis* in favour of sureties, G. iii, 121, 122; see *Suretyship*, 4.

EPISTULA PRINCIPIS, a form of imperial enactment, G. i, 5 and n. 1; see *Constitutiones principum*.

EREPTORIUM, U. xix, 17 and note 2; see *Hereditas*, 10.

ERROR, if excusable, *justa et probabilis ignorantia*, was not to be a source of loss to a man, G. iii, 160; illustrations, G. iii, 91, 160.

ERRORIS CAUSAE PROBATIO, G. i, 67–75, U. vii, 4, a device, due to an unknown Sct., for curing the defects of a marriage entered into by mistake between persons of unequal condition;



ERRORIS CAUSAE PROBATIO—*continued*.

for if the parties knew of the inequality the remedy was inadmissible, G. i, 75.

1. *Cases in which applicable*.—Gaius enumerates six or seven cases, from which it appears to have been immaterial whether the mistake was on the part of husband or wife, and whether the mistaken party was a citizen, a latin, or a peregrin, G. i, 67–71, 74. The following illustrates the general idea:—A citizen having married a latin, peregrin, or deditician wife, believing her a citizen, was allowed to prove cause of error; by doing so he made her (unless a deditician) and any children of the marriage citizens, and at the same time acquired *potestas* over the latter, 67. But error does not seem ever to have been proveable until a child had been born of the marriage, and, if it had been contracted under the Aelia-Sentian law (which see, No. 6), until the child had completed its first year, 73.
2. *Effects of the causae probatio*.—Besides creating citizenship and *potestas*, it invalidated any testament previously made by the husband and father; for with the *potestas* he obtained *sui heredes*, G. ii, 142, (see *Agnatio sui heredis*). In strictness this result followed whether cause had been proved during his life or after his death, *ibid.*; but Hadrian enacted that, if not proved until after his death, his testament was not to be invalidated unless his children had been neither instituted nor disinherited, 143. Though cause was not proved until after their father's death, still the children succeeded *ab intestato* as *sui*, G. iii, 5.

EXCEPTION, *exceptio*, G. iv, 115–125.

## I. EXCEPTIONS GENERALLY.

1. *Definition*.—An exception was a plea allowed to a defender who, though possibly liable according to the letter of the law and of the pursuer's *intentio*, yet averred facts which, if proved, would make condemnation inequitable or impolitic, G. iv, 116: as *e.g.* no value received for a stipulatory promise given on the understanding of an advance, *ibid.*; informal agreement—and therefore not civilly but only naturally obligatory—displacing the contract sued upon, 116a; fraud or constraint used to obtain a transfer of property, 117; or purchase when title known to be a matter of litigation, *ibid.*
2. *Sources of such exceptions*.—A large number of exceptions of frequent recurrence was published in the edict, more special ones formulated to meet particular cases, G. iv, 118;

EXCEPTION—*continued*.I. EXCEPTIONS GENERALLY—*continued*.

- some of them authorised by statute, others flowing from the praetor's jurisdiction, 119.
3. *How introduced in the formula*.—In grafting an exception upon the *formula* (which see), it was worded negatively—if there has been no subsequent agreement not to sue, if there has been no fraud, if the thing was not known to be litigious when purchased, etc.—and inserted immediately before the *condemnatio* (which see), so as in effect to make the latter conditional, G. iv, 119; and it was made use of even in *bonae fidei judicia*, 126*a*, notwithstanding the *liberum officium* possessed in such cases by the judge, 114.
  4. *Answer to it by pursuer*.—See *Replication*.
  5. *Exceptions either peremptory or dilatory*.—Peremptory were those that could not be excluded by lapse of time, of which illustrations are given in G. iv, 121; dilatory those available only for a time, as illustrated in 122, or those founded on some objection to the qualification of the pursuer that was capable of removal, 124.
  6. *What if dilatory exception disregarded by pursuer?*—If a dilatory exception was disregarded, and the action not postponed in the one case, nor the defect cured in the other, the pursuer going on in spite of it lost his cause, G. iv, 123, 124.
  7. *What if a peremptory exception overlooked by defender?*—A defender inadvertently omitting to state a peremptory exception might obtain *in integr. restitutio* (which see) in order to have it added to the *formula*, G. iv, 125; but disputed whether this applied to a dilatory one, *ibid*.

## II. PARTICULAR EXCEPTIONS.

8. *The exceptio doli mali*.—See an explanation in G. ii, 76, note 3. It might be pleaded, for example, in answer to a pupil invoking technicalities in disregard of equity, G. ii, 84; to an owner attempting to oust a possessor, who had in good faith increased the value of the former's property, say by building or planting on it, without reimbursing him, G. ii, 76–78; to a legatee claiming as a legacy what the testator had subsequently alienated, G. ii, 198; to an heir-at-law attempting to oust a testamentary heir holding *bonor. possessio*, on the ground of a trifling informality in the testament, G. ii, 120, 151; to a party claiming possession on the strength of a conveyance he had impetrated by fraudulent representations, G. iv, 117; to a creditor claiming payment in a *stricti juris* action without giving the debtor credit for counter

EXCEPTION—*continued.*II. PARTICULAR EXCEPTIONS—*continued.*

claims *ex eadem materia*, addition to G. iv, 61, note, in *Additions etc.*

9. *Other peremptory exceptions.*—Amongst those referred to are the *ex rei in iudicium deductae*, (see *Litis contestatio*), G. iii, 181, iv, 107, 108, 121; *ex rei judicatae* (see *Judicatae etc.*), *ibid.*; exception of constraint, *metus*, G. iv, 117, 121; exception that a transaction sued on was prohibited by statute, 121, or that pursuer had agreed never to sue, *ibid.*; *ex non numeratae pecuniae*, (often generically *ex doli mali*), 116; *ex rei litigiosae*, 117*a*; and *ex rei nondum traditae* in answer to vendor's action for price, 126*a*.

10. *Particular dilatory exceptions.*—Exception that pursuer had agreed not to sue for a certain time, G. iv, 116*a*; *ex litis dividuae*, G. iv, 56, 122, and *ex rei residuae*, 122, both processual exceptions; also the *ex cognitorea*, objection to the qualifications of a cognitor, (see *Procuratory in litigation*, 2), or to the right of a party to sue by an agent, 124.

EXERCITORIAN ACTION, a praetorian action *in solidum* granted to a creditor against a *paterfamilias* or owner, who, as *exercitor* of a ship, had placed his *filiusfamilias* or slave in charge of it, to recover payment of debts properly incurred on the ship's account, G. iv, 71; afterwards allowed even where it was a stranger freeman or a *servus alienus* that had been placed in command and contracted the debt, *ibid.*

EXPENDO, G. iii, 174 and note, 175, note 4.

EXPENSI LATIO, *expensum ferre*, G. iii, 130; see *Literal obligations*, 1.

EXTRANEI HEREDES, stranger heirs, included all who were neither *sui* nor *necessarii*, (see *Sui heredes*, *Nec. her.*), i.e. those who had not been subject to the *jus* of the deceased, G. ii, 161, e.g. emancipated children in relation to their father, all children in relation to their mother, brothers in relation to each other, *ibid.* To complete their right an act of entry was requisite,—there was in their case no *ipso jure* vesting, U. xxii, 25, (see *Hereditas*, 5, 6). An *extraneus heres* of a patron had no right of succession to his citizen freedmen, G. iii, 58, 64, but had right to that of his Junian latins, 58, 63, see *Succession to cit. freedmen*, 5, *Succ. to Jun. latins*, 3.

EXTRAORDINARIAE COGNITIONES, see *Procedure*, 13.

FACERE, technical meaning, G. iii, 92, note, iv, 2, note 3.

FALSA DEMONSTRATIO in a testament, U. xxiv, 19, (see *Legacy*, 9); in a formula, G. iv, 58, (see *Demonstratio*, 4).

FAMILIA in sense of *patrimonium*, G. ii, 102; *familia pecuniaque*, 104, note 4.

FAMILIAE EMPTOR, FAM. VENDITIO, FAM. MANCIPATIO, see *Testament*, 3, 4.

FAR, what, U. tit. ix, note; see *Manus*, 1.

FESTUCA, see *Vindicta*.

FICTION, *fictio*, an assumption contrary to fact introduced into a *formula* (which see), to adapt it to a case to which it was appropriate in equity and common sense, though not in law, G. iv, 34–38.

1. *Fiction of heirship*.—This was introduced in the *formulae* granted to or against *bonorum possessores*, to enable them to sue or be sued as heirs, G. iv, 34, U. xxviii, 12, and the same fiction was introduced on behalf of a *bonorum emptor*, G. iv, 35.
2. *Fiction of usucapion*.—This was introduced in favour of a proprietor of a *res Mancipi* who had acquired it merely by tradition, and had lost possession before actually completing his quiritarian right, or of a *bonae fidei* acquirer *a non domino* in the same position,—the Publician action (which see), G. iv, 36.
3. *Fictions of citizenship and caput integrum*.—Citizenship was sometimes feigned, in order to allow action to or against a peregrin, contrary to the strict letter of the law, G. iv, 37; and the non-occurrence of a *capitis deminutio* which had actually taken place was sometimes pretended, in order to preserve to a creditor a claim against his debtor which the *capitis minutio* had in strict law extinguished, G. iv, 38.
4. *Fictions that certain legis actiones underlay the corresponding formulae*.—Fictions of another sort imported into certain *formulae* a reference to old *legis actiones*, when the right sued upon had no existence apart from the declaration of law that in the circumstances the *legis actio* referred to should be competent, G. iv, 31a–33.

FIDEICOMMISSUM, a testamentary trust-gift or trust to give,—the word is used in both senses, G. ii, 246–289, U. tit. xxv; see also TESTAMENT.

#### I. FIDEICOMMISSA IN GENERAL.

1. *Nature and varieties*.—The distinctive feature of a *fideicommissum* was that it was left not in imperative but in precativ language, U. xxiv, 1—*rogo, peto, volo, fideicommitto*, and such like, G. ii, 249, U. xxv, 2; being in form a request to heir, legatee, or even a trust-beneficiary, to give effect to the truster's wishes, G. ii, 248, 260. By the *jus civile fideicommissa* were not recognised as binding, U.



FIDEICOMMISSUM—*continued.*I. FIDEICOMMISSA IN GENERAL—*continued.*

- xxv, 1; it was the consuls who first began to enforce obedience to them as expressive of a testator's will, and in course of time a particular magistrate, the *praetor fideicommissarius*, was appointed for that purpose, G. ii, 278, U. xxv, 12. There were three varieties, the *fid. hereditatis*, when the request was to the heir to denude of the whole or part of the inheritance, G. ii, 250; *fid. rei singularis*, when the heir or legatee was requested to denude of a particular thing, G. ii, 260; and *fid. libertatis*, when heir or legatee was asked to enfranchise a slave, G. ii, 263. The only testamentary provisions that could not be put in the form of a trust were the institution of an heir, G. ii, 248, and the appointment of a tutor, G. ii, 289.
2. *Who could leave a fideicommissum.*—Only a man who had made a testament, and therein validly instituted an heir, could bequeath a *fid. hereditatis*, G. ii, 249; but any one qualified to make a testament, even though he had not done so, but was dying intestate, might leave a *fid. rei singularis* or *libertatis*, U. xxv, 4.
  3. *To whom it might be bequeathed.*—Neither *hereditas* nor *res singulae* could be left by trust to a peregrin, G. ii, 285, although to benefit peregrins was one of the principal reasons for the introduction of the institution, *ibid.*; neither, except in the case of a municipality, U. xxii, 5, could they be left to *incertae personae* or *postumi alieni*, though the rule was not always so, G. ii, 287, U. xxv, 13. An heir etc. fraudulently giving a secret promise to denude in favour of one to whom trust-gift was prohibited rendered himself liable to penalties, U. xxv, 17. The restrictions of the Voconian law did not apply to a *fid. hereditatis* in favour of a woman, G. ii, 274, and a Junian latin could take by trust either *hereditas* or *res singulae* without becoming a citizen, 275, U. xxv, 7; by a Pegasian (?) Sct., however, the Julian penalties of celibacy and *orbitas* (see *Julian and Pap. Popp. law*, 4, 5) were extended to *fideicommissa*, G. ii, 286, 286a.
  4. *In what manner.*—To validate a *fid. hereditatis* there required to be a testament and testamentary heir, G. ii, 248; the trust, however, might be embodied in a codicil, whether confirmed or not, G. ii, 273, U. xxv, 11. But a testament was not a necessity in the case of *fid. rei singularis*; if there was one, the trust might be in it, or in a codicil whether confirmed or unconfirmed, U.

FIDEICOMMISSUM—*continued.*I. FIDEICOMMISSA IN GENERAL—*continued.*

xxv, 8; but if the truster was dying intestate, still he might impose a *fid. rei singularis* upon his heir-at-law, G. ii, 270, U. xxv, 4. *Fid. rer. singularum*, if left in a testament, were not invalid because placed in it before the heir's institution, U. xxv, 8; they did not require, like legacies, to be worded in latin, G. ii, 281, U. xxv, 9; in fact it was not essential that they should be put in words at all, any intelligible indication of the truster's will being sufficient, U. xxv, 3.

5. *On whom it might be made a burden.*—A *fid. hereditatis* could be imposed only on the heir, G. ii, 250, or the heir's heir, 277; but a *fid. rei singularis* might be imposed either on heir, legatee, or trust-beneficiary, or their respective heirs, 271, 277, 278, and an entail thus created by a succession of trusts, *ibid.* Contrary to the rule in legacies, if it was a *filiusfamilias* or slave that was instituted heir, a trust might be imposed on his *paterfamilias* or owner, U. xxv, 10. But in no case was a trust sustained that had been imposed by way of penalty, G. ii, 288, U. xxv, 13.

## II. FIDEICOMMISSUM HEREDITATIS.

6. *The request to the heir.*—The request to the heir was either at once, or at a certain date, or on a certain condition, G. ii, 250, or after his death,—in which case it was really a request to *his* heirs, 277,—to denude of the whole or a part of the inheritance and transfer it to the beneficiary, 250.
7. *Heir and beneficiary as vendor and vendee.*—The heir denuding did not thereby cease to be heir, but the position of the beneficiary varied from time to time, G. ii, 251. Originally, in virtue of a *pro forma* sale, it was that of purchaser; and his relations with the heir were adjusted by *stipulationes emptae et venditae hereditatis*, G. ii, 252, (see *Emptio hereditatis*).
8. *The Trebellian senatusconsult.*—This enactment rendered the *pro forma* sale unnecessary, by providing that actions competent to or against an heir might be granted to or against a trust-beneficiary, G. ii, 253, U. xxv, 14; an arrangement that was satisfactory only where what the heir was asked to transfer did not exceed three-fourths of the inheritance, G. ii, 255.
9. *The Pegasian senatusconsult.*—To meet the case of more than three-fourths being included in the *fideicommissum*, and the heir declining such unprofitable entry and thus defeating the trust, this Sct., following the Falcidian law

FIDEICOMMISSUM—*continued.*II. FIDEICOMMISSUM HEREDITATIS—*continued.*

(see *Legacy*, 16), authorised him to retain for himself a fourth of the inheritance, G. ii, 254, U. xxv, 14; the trust-beneficiary, as regarded the other three-fourths, took the position of a partiary legatee (see *Legacy*, 8), G. ii, 254–257, U. xxv, 15; and *stipulationes partis et pro parte* were then interchanged, assuring *pro rata* division of assets and liabilities, *ibid.*, although actions remained competent only to and against the heir, U. xxv, 14.

10. *What if heir declined to enter?*—In that case it was provided by the Pegasian Sct. that, on application of the trust-beneficiary, the praetor should compel him to enter; but he incurred no risk, and derived no advantage; the beneficiary took everything, and sued and was sued under the Trebellian Sct., G. ii, 258, U. xxv, 16.

## III. FIDEICOMMISSUM REI SINGULARIS.

11. *What might be so left.*—Anything that might be legated by damnation (see *Legacy*, 22, 23) might be bequeathed by *fideicommissum*, U. xxv, 5, no matter to whom it belonged, G. ii, 261; but the person burdened with it could not be required to transfer more than he had himself received under the testament, *ibid.* Where it was a *res aliena*, it had to be purchased and delivered, or its value paid in money, G. ii, 262; although some were of opinion that if its owner refused to sell the trust was extinguished, *ibid.*

IV. FIDEICOMMISSUM LIBERTATIS; see also *Manumission*.

12. *To whom freedom might be bequeathed by trust.*—A testator might desire his heir or legatee to manumit slaves whom he could not himself enfranchise directly, e.g. a *servus alienus*, G. ii, 264, 272, U. ii, 10; the heir was then required to buy and manumit him, G. ii, 265; but if his owner would not sell him, the gift failed, freedom having no alternative value, *ibid.*, U. ii, 11. Further, though a man could not (unless insolvent, G. i, 21) institute one of his own slaves as his heir with freedom, yet he might by *fideicommissum* direct that his slave should be enfranchised and have the succession on attaining that age, G. ii, 276 and note.
13. *How patronage was influenced by fideicommissary enfranchisement.*—Where a slave was directly enfranchised by testament, the deceased testator was his patron, G. ii, 267, U. ii, 8; but one manumitted under a trust became a freedman not of the testator's but of the manumitter's, G. ii, 266, U. ii, 8.

FIDEICOMMISSUM—*continued.*

## V. POINTS OF DIFFERENCE BETWEEN LEGACIES AND FIDEICOMMISSA.

—There are a great many of these indicated in G. ii, 268-288, and U. xxv, 7-13; but it is unnecessary here to reproduce them.

FIDEJUSSIO, see *Suretyship*, 4.

FIDEM DARE, OBLIGARE, FALLERE, G. iii, 92, note.

FIDEPROMISSIO, see *Suretyship*, 2, 3.

FIDES, BONA, see *Bona fides*.

FIDES (DEA), G. iii, 92, note.

FIDUCIA was an agreement accompanying a conveyance by *manipatio* or *in jure cessio*, whereby the transferee undertook to reconvey in a certain event, G. ii, 59, 60.

1. *Fiducia contracted with a friend.*—This was of frequent occurrence before the development of the real contract of deposit: a man about to travel say, to ensure the safety of something belonging to him, conveyed it in property to a friend, the latter undertaking to reconvey on demand, G. ii, 60 and note. The agreement founded in favour of the transferor in trust an *actio fiduciae*, which was *juris civilis*, G. iv, 33, and *bonae fidei*, 62; condemnation in it rendered the unfaithful trustee infamous, 182. If the transferor reacquired possession, even without a reconveyance, he made the thing his again by *usureceptio*, (see *Usucapion*, 7), one year's possession being sufficient even in the case of lands, G. ii, 59 and note, 60.
2. *Fiducia contracted with a creditor.*—This was common before the contract of pledge was developed; by way of security a debtor conveyed property to his creditor, on an agreement for reconveyance when the debt was paid, G. ii, 60, 220, which also founded an *actio fiduciae*, as above. When the debt was paid the debtor had *usureceptio* in a year, whatever his *causa possessionis*, *ibid.*; but while unpaid, he could not usurecapt the *fiducia*—the name was given to the thing as well as the agreement, 59, note—if he had it in location or by precarious grant from his creditor, 60. Yet even before reconveyance or usureception, the debtor had thus far still an equitable interest in it,—that if he legated it by preception (see *Legacy*, 28) to one of several heirs, the others had to redeem it, G. ii, 220.

FIDUCIARY COEMPTIO, G. i, 114, see *Manus*, 7; fiduciary tutory, G. i, 166, see *Tutory*, 3, 12, 21.

FILIUSFAMILIAS, FILIAFAMILIAS, a child *in potestate*, not necessarily son or daughter, but even a remoter descendant, if in the *potestas* of the *paterfamilias*; and not necessarily of



FILIUSFAMILIAS, FILIAFAMILIAS—*continued*.

youthful age, for a *filiusfamilias* might himself be father or even grandfather, G. i, 127, 133b. For the modes in which a person became or ceased to be *filiusfamilias*, see *Patria potestas*, 7–17; for an indication of his capacities and disabilities, see *Alieni juris personae*, 2–4; for an indication of his rights in regard to the *hereditas* of the *paterfamilias*, see *Sui heredes*. A *filiusfamilias* was under no incapacity so far as regarded acts done in his character of a citizen, as e.g. witnessing a transaction *per aes et libram*, or acting as *libripens* or *familiae emptor*, G. ii, 105–108.

FISCUS, the imperial treasury. By a Sct. of Hadrian's *fideicommissa* to peregrins were to fall to the fisc, G. ii, 285; and by a constitution of Caracalla's *caduca* (see *Caducity*, 5) were to go to it, with a certain reservation in favour of near relatives of the testator's, U. xvii, 2 and note, as amended in *Additions etc.*

FLAMINES MAJORES required to be issue of a confarreate marriage, and themselves be wedded in the same way, G. i, 112.

FLAMINICA DIALIS, G. i, 136 and note.

FOREIGN LAW was occasionally appealed to where peregrins were concerned, as for example in judging of the legitimacy of issue of a peregrin marriage, G. i, 92, the validity of a peregrin testament, U. xx, 14, or the effect for his heir of a peregrin's *fidepromissio*, G. iii, 120.

FORMAL AND MATERIAL CONTRACTS, G. iii, 89, note; see *Contract*, 3.

FORMULA, G. iv, 39–68, the issue which, under the formular system (see *Procedure*, 8), was adjusted for the trial of a cause.

1. *Its form and parts*.—It was addressed either to a single *judex* or to recuperators, G. iv, 46, 47, 105 and note; and, in its simplest form, instructed them, if they found it proved that the property claimed by the pursuer was his, or that the defender was indebted to him in what was claimed, then to condemn the defender to the pursuer, but if not proved to acquit him, G. iv, 41, 43. The ordinary clauses were the *demonstratio*, *intentio*, *adjudicatio*, and *condemnatio*, (see those words), 39–43; but only the *intentio* could stand alone, viz. in *praejudicia*, 44. Besides these a formula might be preceded by a *praescriptio* (which see), G. iv, 130–137, and have incorporated in it fictions, 32–38, exceptions, 115–125, and repetitions, duplications, etc., 126–129, (see those words).
2. *In whose names it ran*.—If parties were not litigating in person but by cognitors or procurators (see *Procuratory in litigation*), the *intentio* was formulated in the name of the

FORMULA—*continued*.

principal, and the *condemnatio* in that of the agent, G. iv, 86, 87. The same course was taken when a man was suing upon a claim he had acquired by purchase or otherwise,—he took the *intentio* in name of the original creditor, and the *condemnatio* in his own, G. iv, 35.

3. Formulae in *jus* and in *factum* conceptae.—A formula was said to be *in jus concepta* when the pursuer laid his *intentio* on the *jus civile*, in one or other of the forms *ejus esse ex jure Quiritium*, *dare oportere*, *dare facere oportere*, or *damnum decidere oportere*, G. iv, 45, 47, 60; *in factum* when he contended that something had happened which, under the praetor's edict, entitled him to redress, 46. In one or two cases, as in deposit and commodate, the *formula* could be conceived either way, 47 and note. Of those *in factum* there was a large collection in the album, 46.

4. *Certae* and *incertae* formulae.—A *formula* was *certa* when the claim was for a specified thing or a definite sum of money, G. iv, 44; *incerta* when it was illiquid, and for what in the circumstances the judge might find the pursuer entitled to, 41, 54, 131. An *intentio certa* might sometimes be followed by a *condemnatio incerta*, G. iv, 68, (see *Condemnatio*, 2).

FORMULAR SYSTEM, see *Procedure*, 2, 8.

FRAUDULENT EVASION OF A STATUTE, G. i, 46.

FRAUDULENT MANUMISSION to injury of creditors or patrons, G. i, 37, U. i, 16; see *Ael. Sent. law*, 1.

FREEDMEN, in the abstract *libertini*, in relation to a patron *liberti*, were persons freed from lawful slavery, G. i, 11, and were either citizens, Junian latins, or classed with the *dediticians*, G. i, 12, U. i, 5; (see *Manumission*, *Junian latinity*, *Deditician freedmen*). In the ordinary case they were in patronage of their manumitters, the patron being entitled to services from his *liberti*, G. iii, 83, 96a, iv, 162, (see *Patronate*, 3); to the tutory of males among them who were under puberty, and females of any age, G. i, 165, iii, 43, (see *Tutory*, 18, 19); and to their estates on their death, (see *Succession to citizen freedmen*, *Succ. to Junian latins*, *Ded. freedmen*, 3). The right to services, and those of tutory and succession, being *jura legitima*, were extinguished by *capitis deminutio* of either patron or freedman, G. iii, 51, 83, U. xi, 9. A freedman was not permitted to summon his patron without leave of the praetor; if he did, the patron was allowed an action of damages, G. iv, 46.

FREEDOM was enjoyed by *ingenui* by right of birth, by *libertini* in

FREEDOM—*continued*.

respect of their subsequent acquisition of it, (see *Freedmen*), G. i, 10. It was lost by a man who wilfully evaded inscription in the census register, G. i, 160, U. xi, 11, and by a woman who persevered in cohabiting with a slave notwithstanding the warning of the latter's owner (see *Claudian Sct.*), *ibid.* It was held incapable of valuation; therefore if a fideicommissary grant of freedom to a *servus alienus* failed through his owner's refusal to sell him, it was impossible to recompense him, G. ii, 265 and n. 1. Out of favour for freedom an *adsertor libertatis* deposited the smallest *sacramentum* known to the law, G. iv, 14 and n. 2; see *Slavery*, 9.

FRUCTUARIA STIPULATIO, G. iv, 166; FRUCTUARIUM JUDICIUM, G. iv, 169; see *Interdicts*, 14, *Cautiones etc.*, 5.

FRUCTUS LICITATIO, G. iv, 166; see *Interdicts*, 14.

FURIOSI, see *Lunacy*.

FURTUM, see *Theft*.

GALATIANS, the, claimed to have a *patria potestas*, G. i, 55.

GENS, the, by the Twelve Tables had rights of tutory and succession on failure of agnates, G. i, 164*a* and note, iii, 17. The law affecting it was obsolete before the time of Gai., G. iii, 17.

GESTIO PRO HEREDE, G. ii, 166, U. xxii, 26; see *Hereditas*, 5, 6.

GLADIATORS, G. iii, 146, 199.

GRADUS and ORDO in succession, distinction, G. iii, 27, note 1.

HABITATIO, a gratuitous right of occupancy of a house, which left the legal possession in the grantor, G. iv, 153.

HADRIAN, see *Constitutiones principum*, *Senatusconsults*.

HASTA, the symbol of quiritarian ownership, G. iv, 16, and as such displayed in the centumviral court, *ibid.* For certain purposes a rod, *festuca* or *vindicta*, was used as a substitute, see *Vindicta*.

HERCULES GADITANUS, U. xxii, 6.

HEREDITAS, inheritance, the succession of the *jus civile*, in contradistinction to the *bonorum possessio* of the praetors. See also SUCCESSION, BONORUM POSSESSIO.

## I. DELATION OF AN HEREDITAS.

1. *Delation ex testamento*.—See *Testament*.

2. *Delation ab intestato*.—See *Intestate succession*.

## II. HOW IT VESTED IN THE HEIR.

3. *In the case of sui heredes*.—An inheritance, whether delate *ex testamento* or *ab intestato*, vested in *sui heredes* (which see) *ipso jure*, G. ii, 157, U. xxii, 24; for they were not

HEREDITAS—*continued*.II. HOW IT VESTED IN THE HEIR—*continued*.

only *sui* but also necessary heirs, *ibid.* The praetor, however, allowed them to abstain when the estate was insolvent, G. ii, 158, U. xxii, 24, (see *Abstinendi potestas*). But a *suus* who had once intromitted could not afterwards relinquish, unless he was a minor and obtained *in integrum restitutio* (which see), G. ii, 163.

4. *In that of necessarii heredes*.—A *heres necessarius* (see *Nec. heredes*), whether a slave of the testator's or a person held by him *in mancipii causa*,—and both could succeed only *ex testamento*,—also acquired *ipso jure*, G. ii, 153, U. xxii, 24; but the latter had the same *beneficium abstinendi* as a *suus*, G. ii, 160, while the former could in no case decline, 153.
5. *In that of an extraneous heres testamentarily instituted with cretion*.—A stranger heir instituted with cretion, under penalty of disherison, G. ii, 164, 165, U. xxii, 27, (see *Cretio*, 1), had to cern within the time limited, G. ii, 166, 170, U. xxii, 30; informal acceptance was insufficient, G. ii, 168; but informal declinature did not preclude subsequent cerniture if the cretion-days had not expired, *ibid.*, U. xxii, 30. If the penalty of non-cerniture was not disherison (see *Cretio*, 1), but admission of a substitute (see *Substitution*, 1), G. ii, 177, U. xxii, 34, the rule in the time of Gai. was that, by behaving as heir (*gestio pro herede*) instead of cerning, he let in the substitute for an equal share, G. ii, 177; but it was afterwards altered in his favour so as to let him keep the whole, U. xxii, 34.
6. *In that of an extraneous instituted without cretion or taking ab intestato*.—In either of these cases a stranger might enter either by cerning, by informal declaration of acceptance, or by behaving as heir, G. ii, 167, U. xxii, 25, 26; an informal declinature was sufficient to exclude him, G. ii, 169; but if he had once entered he could not relinquish, unless a minor, 163. He was not required, however, to decide at once,—he was allowed a *tempus deliberandi*, 162, fixed by the praetor on the petition of the deceased's creditors, 167, who were entitled to sell the estate if he did not enter before its expiry, *ibid.*
7. *Entry by persons in tutelage, filiifamilias, and slaves*.—A pupil or a woman in tutelage could not enter without tutorial *auctoritas*, G. i, 176; a *filiusfamilias* could enter only on the instructions of his *paterfamilias*, ii, 87, U. xix, 19; and a slave on those of his owner at the moment, G. ii, 188–190, U. xxii, 13, 14.



HEREDITAS—*continued.*

## III. FAILURE OF THE HEIR TO TAKE OR KEEP.

8. *Failure to take under a testament.*—As regards the results of failure of one or more of several testamentary heirs, see *Adcretio*, 2, *Caducity*, 3. Total failure caused intestacy, G. ii, 144; but that, by operation of the Julian law, the inheritance went to the heir-at-law caduciarily, and under burden of all the legacies, etc., contained in the testament, seems fairly deducible from U. xvii, 3, xxviii, 7, and G. ii, 149. (The case, however, is hardly conceivable; for if the inheritance was lucrative, the testamentary heirs were unlikely to decline it, while if insolvent it would be taken by deceased's creditors for what it was worth, G. ii, 167.)
9. *Failure to take ab intestato.*—When there was failure of one or more of several equally entitled, there was accretion in favour of those who took, U. xxvi, 5. If all the *legitimi heredes* of the first degree failed, there was by law no transmission to those of the next, G. iii, 12, U. xxvi, 5; they were admitted, however, by the praetors to *bonorum possessio* as cognates, G. iii, 28, (see *Bonor. possessio*, 16). When there was total failure both of civil and praetorian heirs, the inheritance fell to the state, G. ii, 149, U. xxviii, 7.
10. *Incapacity of an heir to retain what had come to him.*—When a testamentary heir was guilty of ingratitude or disrespect to the memory or the family of the testator, he was liable to have his inheritance taken from him on the petition of the fisc; it was then called *eraptorium*, and went to the state, U. xix, 17 and n. 2.

## IV. THE HEIR'S POSITION.

11. *In reference to co-heirs.*—Their rights *inter se* were adjusted in an *actio familiae erciscundae* (which see), G. ii, 219.
12. *In reference to legatees.*—See *Legacy*, 18–34.
13. *In reference to trust-beneficiaries.*—See *Fideicommissum*, 6–11.
14. *In reference to third parties.*—Inheritance was a universal acquisition of the deceased's estate, G. ii, 98. For a few of his debts the heir was not liable, and in a few of his claims he could not insist, see *Actions*, 7; but with those exceptions, he was entitled to proceed against deceased's debtors, G. iv, 34, and was liable to action at the instance of his creditors, G. ii, 35, and even to be made a bankrupt on account of his debts, G. ii, 154.

## V. CESSION OF AN HEREDITAS IN JURE.

15. *Cession by an heir-at-law.*—An agnate ceding *in jure* before entry made the cessionary heir in his stead, G. ii, 35, iii,

HEREDITAS—*continued.*V. CESSION OF AN HEREDITAS IN JURE—*continued.*

85, U. xix, 13, 14. If, however, the cession was not until after entry, the cedent remained heir and responsible to the deceased's creditors, *ibid.*, U. xix, 15; corporeals passed to the cessionary as if they had been ceded individually; while claims were extinguished and the deceased's debtors so much the gainers, *ibid.*

16. *Cession by a testamentary heir.*—Any such cession before entry was useless, G. ii, 36, iii, 86; after entry it had the same effect as cession by an heir-at-law in similar circumstances, *ibid.*

17. *Could there be cession by a necessary heir?*—The Proculians were of opinion that after entry he had the same power of cession as others; the Sabinians held cession by him useless, G. ii, 37, iii, 87.

HOMER quoted, G. iii, 141.

HOSTIA, G. iv, 28 and n. 1.

## HUSBAND AND WIFE.

1. *Creation of the relationship.*—See *Marriage*.
2. *Respective positions of the parties when marriage accompanied by in manum conventio.*—See *Manus*, 4, 5.
3. *Position of the wife when marriage unaccompanied by manus.*—She did not become a member of her husband's family, but still remained *sui juris* or in *patria potestate*, as the case might be, U. vi, 6; her children were not civilly her agnates, but only naturally her cognates, G. iii, 24. If she were assaulted or insulted, her husband was entitled to an *actio injuriarum* if she was *in manu*; but judging from the language of Gai. he seems to have had no such right without it, G. iii, 221.
4. *The dos or dowry.*—See *Dowry*.
5. *Donations between the spouses.*—Although, in the absence of *manus*, each had or might have a separate estate, yet donations by one to the other were invalid except they were *mortis causa*, *divortii causa*, or to obtain freedom for a slave; the wife being also allowed in a few cases to make a gift to her husband to enable him to obtain rank or dignity, U. vii, 1. If the husband had made a donation to his wife, not being one of those excepted, he was entitled to deduct it from the amount of the dowry in restoring it on the dissolution of the marriage, U. vi, 9, and note to rubr. tit. vii.
6. *Divorce.*—A wife *in manu*, in the event of divorce, might compel her husband to release her from *manus* by remanicipation (which see), G. i, 137. In the absence of *manus*

HUSBAND AND WIFE—*continued*.

it was one of the consequences of divorce that the *dos* had to be restored, with or without deduction, U. vi, 6 f., (see *Dowry*, 5, 6). Before restoring it the husband was entitled to be relieved of any obligation he had undertaken in respect of it, or of his wife's property generally, U. vii, 3 and note. After dissolution of the marriage either might sue the other in an *actio rerum amotarum*, on account of theftuous removal of property in prospect of divorce, U. vii, 2 and note.

7. *Their rights of succession inter se*.—A wife *in manu* was *filiae loco* and one of her husband's *sui heredes*, U. xxii, 14, and entitled therefore to all their rights and privileges in the matter of succession; see *Sui heredes*. A wife not *in manu* had no right of succession under the *jus civile*; but the praetors admitted the survivor of husband or wife to *bonorum possessio ab intestato* of the predeceaser next after cognates, U. xxviii, 7; and the Julian and Pap. Popp. law (which see, No. 6) contained elaborate provisions as to the extent to which one might take under the other's testament, and which were to a great extent dependent on consideration of the number of children born of the marriage, U. xv, xvi, 1, 1a, 2, 4.

HYPOTHEC, landlord's, over the *invecta et illata* of his farm-tenant, G. iv, 147.

ILLEGITIMACY, see *Parent and child*.

IMAGINARY DEEDS.—Mancipation was an imaginary sale, G. i, 119; *testamentum per aes et libram*, an imaginary mancipation, U. xx, 2; acceptance and *nexi solutio*, imaginary payments, G. iii, 169, 173.

IMPENSAE, outlays on account of a thing, were either necessary, beneficial, or superfluous (*necessariae, utiles, voluptuosae*), U. vi, 14: the first such as were needful to maintain the *status quo*, 15; the second such as increased revenue, 16; the third such as only added to amenity, 17.

IMPERFECTA LEX, one that neither nullified what was done in contravention of it nor punished the contravener, U. i, 1.

IMPERIAL CONSTITUTIONS, G. i, 5; see *Constitutiones principum*.

IMPERIO CONTINENS JUDICIUM, see *Judicia legitima etc*.

IMPUBERATES, males and females under 14 and 12 respectively, G. i, 196, ii, 112, (see *Puberty*). They might be either *sui juris* (and then called pupils) or *alieni juris*; neither class could contract marriage, U. v, 2, or act as witness of a mancipation or other solemn deed, G. i, 29, 113, 119, ii, 104; unless *pubertati proximi* neither was held responsible

IMPUBERATES—*continued*.

for crime or delict, G. iii, 208. A *sui juris* impubere could not make a testament, G. ii, 113, U. xx, 12, but one might be made for him by pupillary substitution in that of his father (see *Substitution*, 2), G. ii, 179, U. xxiii, 7; in other transactions he could act with *auctoritas* of a tutor, though it was not always necessary, (see *Pupils*).

IN BONIS HABERE, see *Bonitarian ownership*.

INCERTA PERSONA, one of whom it was impossible for a testator to have formed any definite idea in his own mind, G. ii, 238, could neither be instituted heir, G. ii, 242, 287, U. xxii, 4, nor be left a legacy, G. ii, 238, 287, U. xxiv, 18, or trust-gift, G. ii, 287, U. xxv, 13, except *sub certa demonstratione*, i.e. under reference to a well-defined class, G. ii, 238, U. xxiv, 18. A *postumus alienus* (see *Postumi*, 3) was regarded as *incerta persona*, G. ii, 242; and so was a municipality, so far as institution by any but its own freedmen was concerned, U. xxii, 5, although it might take both legacies, U. xxiv, 28, and trust-gifts, U. xxii, 5. An *incerta persona* could not be appointed tutor, G. ii, 240; and the Fufian law made testamentary enfranchisement useless unless the slave was named, G. ii, 239.

INCESTUOUS MATRIMONIAL CONNECTION, see *Marriage*, 6.

INCORPOREALS, what, G. ii, 14; were mostly *nec Mancipi*, 17; were incapable of tradition, 19. See *Things*, 4.

INDEBITI SOLUTIO, payment under erroneous belief of indebtedness, in the ordinary case imposed on the payee an obligation to refund, enforceable by a *condictio indebiti*, G. iii, 91; even a pupil or a woman receiving an *indebitum* without tutorial *auctoritas* was liable, because the obligation, though created *re*, yet did not arise from contract, *ibid*. It was a sufficient answer to the *condictio* that what had been paid was due naturally, though possibly not civilly, (see *Obligation*, 5), G. iii, 119*a*, note 1. There was an arbitrary rule that an erroneous payment by an heir in name of legacy—Gai. confines it to one *per damnationem*, G. ii, 283—did not entitle him to a *condictio*, U. xxiv, 33; but it did not apply to *fideicommissa indebita*, G. ii, 283.

INFAMY, *ignominia*, resulted from condemnation in an action arising out of partnership, fiduciary agreement, tutory, mandate, or deposit, and from either condemnation in or compromise of one arising out of theft, robbery, or personal injury, G. iv, 182; while the same result followed sale of a bankrupt's estate, G. ii, 154. An individual affected by it was disqualified for acting in a litigation on another person's behalf, or himself appointing a *cognitor* or *procurator*, G. iv 182.



INFANCY, children in, or not much beyond it, were in law regarded as having no more intelligence than a lunatic; their tutors therefore, if they were *sui juris*, acted for them, not with them, G. iii, 106, 107, 109, U. xi, 25. (Infancy ended at the age of seven.)

INFIRMATIO TESTAMENTI, invalidation of a testament, which see, Nos. 21–24.

INGENUI, persons of free birth, G. i, 11; see *Persons*, 1.

INHERITANCE, see *Hereditas*.

IN INTEGRUM RESTITUTIO, a praetorian relief granted to persons who had suffered injury, loss, or damage for which there was no available or convenient remedy by action: the praetor reinstated them in the position they occupied before the event occurred to which their loss was attributable. It was granted to minors *in omnibus rebus lapsis*, G. iv, 57; e.g. on inconsiderate entry to a *damnosa hereditas*, G. ii, 163, loss of an action by reason of overclaim (see *Intentio*, 3), G. iv, 53, or acceptance as pursuer of a *formula* containing too little in the *condemnatio* (which see, No. 3), G. iv, 57. It was not often granted to persons of full age, G. ii, 163; but any defender in an action was entitled to have it when the praetor had inserted too great a sum in the *condemnatio*, in order to have it diminished, G. iv, 57, such relief being always granted more readily to a defender than a pursuer, *ibid.*

IN JURE CESSIO, a civil mode of conveyance, and really a *vindicatio* (which see) arrested in its first stage, on the defender's confession *in jure*, G. ii, 24, 96, iv, 16, note.

1. *Ceremonial*.—The parties, transferor and transferee, appeared *in jure*, i.e. before a magistrate, bringing with them, if corporeal, the thing to be ceded; the transferee, laying hold of it, asserted that it was his in quiritarian right; the magistrate asked the transferor whether he made any counter-vindication; and if he got no answer, or one in the negative, he declared the thing to belong to the transferee, G. ii, 24, U. xix, 9, 10. But the cession might be under reservations or qualifications, e.g. a *pactum fiduciae* (see *Fiducia*), G. ii, 59, iii, 201.
2. *To whom competent*.—As a civil mode of conveyance it was peculiar to citizens, G. ii, 65, but probably competent also to colonial and Junian latins and to peregrins who had *commercium* (which see), U. xix, 4; but it could not be employed by persons *alieni juris* on account of the words of style, G. ii, 96.
3. *What might be conveyed by it*.—It was a suitable form of conveyance either for *res Mancipi* or *nec Mancipi* (which

IN JURE CESSIO—*continued*.

see), U. xix, 9; but for the former mancipation was preferred, as usually more convenient, G. ii, 25. It was suitable for conveyance either of corporeals or incorporeals, and (with exception of rural praedial servitudes, which might be mancipated, G. ii, 29) the only civil form applicable to the latter, *e.g.* urban praedial servitudes, G. ii, 29, a usufruct, G. ii, 30–32, U. xix, 11, an inheritance, G. ii, 34–37, iii, 85–87, U. xix, 12–15, and certain tutories, G. i, 168–172, U. xi, 6–8, xix, 11. But it was inapplicable to provincial lands that were not *juris Italici* (see *Jus Italicum*), G. ii, 31, for they belonged to the state, G. ii, 7, nor to obligations, because their cession was impossible, G. ii, 38.

INJURIA, see *Personal injury*.

IN JUS VOCATIO, formal summons to appear in court,—a necessary initiative of any litigation, G. iv, 183; but children and freedmen were not allowed to summon parents or patrons without leave of the praetor, *ibid.*, and if they did were liable to penalties, 46, 183. If the party summoned neither attended nor found a substitute, he also was liable in penalties, 46; and so was any one carrying him off to prevent his attendance, *ibid.*

INNOMINATE CONTRACTS, G. iii, 89, note 1; see *Contract*, 1.

IN REM ACTIO PER SPONSIONEM, alternative to that *per formulam petitoriam* (the *vindicatio*), G. iv, 91–96. The preliminary step was a stipulation by the claimant for twenty-five sesterces from the possessor in the event of the thing in dispute being found to belong to the former, 93; but there was no restipulation, the sponsion being prejudicial, not penal, 94. On the promise a formula was adjusted, stipulant claiming the twenty-five sesterces, 93; and defender gave security in a *stipulatio pro praede litis et vindiciarum*, in imitation of the old sacramental procedure, (see *Legis actiones*, 2), 91, 94. Condemnation or absolvitor on the sponsion involved judgment on the question of property, 94. If the action was to be in the centumviral court, a *sacramentum* before the praetor took the place of the sponsio, 95, 31; the stake being 125 sesterces, 95, the equivalent of the 500 *asses* of the older procedure, 95, note 2, 14.

INSANITY, see *Lunacy*.

INSTITUTOR ACTION, one of the praetorian adjectician actions, granted to a creditor against a *paterfamilias* or owner, who had placed his *filiusfamilias* or slave as *institor* in charge of a shop or other business, to recover payment in

INSTITUTORIAN ACTION—*continued.*

*solidum* of debts properly incurred on account thereof, G. iv, 71; afterwards allowed even when it was a stranger freeman or a *servus alienus* that had been placed in charge and contracted the debt, *ibid.*

INTENTIO, one of the clauses of a *formula*, (which see, No. 1).

1. *Its purpose and position.*—It was in the *intentio* that the pursuer embodied his claim, G. iv, 41; it was so important that no *formula* could do without it, 44; where there was no *demonstratio* (which see) it stood first, 86, and with one it stood second, 47. In *formulae in jus conceptae* (see *Formula*, 3) it was couched in technical words derived from the *jus civile*, 41, 37; in those *in factum* it was in a freer style, with which a demonstration was in a manner amalgamated, 46, 47.
2. *Styles.*—(a.) *Rei vindicatio*—‘*si paret hominem ex jure Quiritium actoris esse*,’ G. iv, 41: (b.) vindication of a thing *pro indiviso* (preceded by a *demonstratio*)—‘*quantam partem paret in eo fundo, quo de agitur, actoris esse*,’ G. iv, 54: (c.) *condictio certi* (applicable to claim on loan of money, stipulatory promise for a definite sum, literal obligation, *indebitum*, etc.)—‘*si paret reum actori x milia dare oportere*,’ G. iii, 91, iv, 4, 41, 86, etc.: (d.) *actiones incertae* (preceded by a *demonstratio*)—‘*quidquid paret ob eam rem reum actori dare facere oportere*,’ or ‘*quidquid ob eam rem reum actori dare facere oportet*,’ G. iv, 41, 47, 54, 60, 131, 131a, 136, applicable to claims on *bonae fidei* contracts, indefinite claims under stipulations, etc.: (e.) *formulae in factum conceptae*—‘*si paret patronum (actorem) a liberto (reo) contra edictum praetoris in jus vocatum esse*,’ G. iv, 46; ‘*si paret actorem apud reum mensam deposuisse, eamque dolo malo rei actori redditam non esse*,’ 47. But these styles, and many others given by Gai., are skeletons merely; what was vindicated in real actions had to be properly described, G. iv, 41, note 2, as amended in *Additions etc.*; and in personal ones the ground of claim,—testament, stipulation, or what not, to be explained, 55. In *bonae fidei judicia* (which see) the words *ex fide bona* were introduced, G. iv, 47. When the action was by an *argentarius* against a customer, he had to set off in the *intentio* any counter-claim of the latter’s of the same description as that sued upon, (see *Compensation*, 3)—‘*si paret reum actori x milia dare oportere amplius quam ipse actor reo debet*,’ G. iv, 64.
3. *Consequences of claiming too much, too little, or under a wrong description.*—If in his *intentio* a man claimed more than

INTENTIO—*continued*.

he was entitled to—which, however, was impossible in those that were *incertae*, G. iv, 54—he lost his cause, no matter how good it might be for less, 53, 60, 68, and could not be reinstated so as to sue afresh except on the ground of minority, 53 and n. 2, (see *In integr. restitutio*). To claim less than he was entitled to was of course lawful; but he could not sue for the residue within the same praetorship, 56. To claim one thing instead of another, or wrongly to describe the source of claim, as *e.g.* testament instead of contract, did not prevent a fresh action at any time, 55.

INTERDICTIO AQUA ET IGNI, practically outlawry, G. i, 128 and n. 2, 161, U. x, 3, xi, 12; see *Citizenship*, 9.

INTERDICTION OF PRODIGALS, G. i, 53, U. xii, 23, xx, 13; see *Curatory*, 1.

INTERDICTS, *interdicta*, G. iv, 138–170a.

## I. NATURE AND CLASSIFICATIONS.

1. *Interdict, what?*—It was an order pronounced by a magistrate, on application of an individual, to facilitate the settlement of some dispute, 139; when put positively it was specifically a decree (*decretum*), the name of interdict being more appropriate to one put negatively, 140.
2. *Restitutory, exhibitory, and prohibitory interdicts*.—They were called restitutory when the order was to restore a thing, exhibitory when the order was for production, prohibitory when something was prohibited, 140, 142.
3. *Possessory interdicts*.—A large class of them were either *adipiscendae vel retinendae vel recipiendae possessionis causa comparata*, according as their purpose was the acquisition, retention, or recovery of possession, 143.
4. *Interdicts single and double*.—They were said to be single (*simplicia*) when the applicant became pursuer in the proceedings that followed the order, and his adversary defender, 157, as in all the restitutory and exhibitory and most of the prohibitory interdicts, 159, 158; double (*duplicia*) when each party was at once pursuer and defender, as in *uti possidetis* and *utrubi*, for retaining possession, 160.

## II. THE POSSESSORY INTERDICTS IN PARTICULAR.

5. *Those adipiscendae possessionis causa comparata*.—They were so called because they were of service only to an individual who had not yet obtained possession at all, 144. The principal were the *int. quorum bonorum* at the instance of a *bonor. possessor* (see *Bonor. possessio*, 5), to enable him to obtain things belonging to the inheritance



INTERDICTS—*continued.*II. THE POSSESSORY INTERDICTS IN PARTICULAR—*continued.*

- from any one retaining them either as heir (*pro herede*) or without any pretence of title (*pro possessore*), *ibid.*; the *int. possessorium* at the instance of a *bonor. emptor* (see *Emptio bonor.*), and the *int. sectorium* at the instance of a *bonor. sector* or purchaser of a confiscated estate,—both for the same purpose as the *quor. bonor.*, 145, 146; and the *int. Salvianum* to enable a landlord to obtain possession of effects of his farm-tenant's hypothecated for the rent, 147.
6. *Those retinendae possessionis causa comparata.*—These, viz. *uti possidetis* and *utrubi*, were to enable a man to keep possession which was being disturbed, and are said to have been introduced as ancillary to a litigation about ownership, and for the purpose of deciding which party was to stand pursuer, which defender, in the *vindicatio*, 148.
7. *The int. uti possidetis.*—This was employed in reference to immoveables, 149; it was addressed equally to both parties, forbidding both to use any force, *vis*, to disturb the existing state of possession, 160; and he eventually prevailed who proved that he was actually in possession at the moment of the interdict, and had not taken it vitiously from his adversary, *i.e.* either forcibly, stealthily, or by refusal to vacate on recal of a grant during pleasure (*precario*), 150.
8. *The int. utrubi.*—This was used when the dispute was about moveables, 149; it also was addressed to both parties, who were both prohibited forcibly interfering with the possession of that one of them—which? was to be afterwards ascertained—who had been in possession for a longer period during the praetorian year than his adversary, 160, 150, 152, and note in *Additions etc.*, and that without vitious exclusion of the latter, 150; and if his own possession was non-vitious, either party was entitled to add to it the rightful possession of any one from whom he had justly acquired it, 151, (see *Accessio temporis*). In both interdicts the possession founded on might be that of a representative, or even one retained without occupancy, by mere effort of will, 153, (see *Possession*).
9. *The int. unde vi.*—For recovering possession that had been lost the *int. unde vi* was employed, 154; its purpose being the reinstatement of a party who had been forcibly ejected from his land or house, *ibid.*, but provided always he had not himself in the first instance taken the possession vitiously from the ejector, *ibid.* In the ordinary

INTERDICTS—*continued.*II. THE POSSESSORY INTERDICTS IN PARTICULAR—*continued.*

case it was lawful to use force to eject a vitious possessor, *ibid.*, so long as it was not force of arms, 155; for then, as a punishment of the offence, the ejector was invariably compelled to restore the possession, *ibid.*

## III. PROCEDURE IN SINGLE INTERDICTS.

10. *Alternative courses open to defender.*—The pronouncing of the interdict was but the first step in the procedure, 141; the next was to remit it for trial on the merits, *ibid.* In prohibitory interdicts there was but one course—to interchange penal sponsions, adjust a *formula* upon them, and send it to a *judex*, *ibid.*; but in restitutory and exhibitory ones the defender might demand a less hazardous *arbitraria formula* and a remit to an arbiter, *ibid.*, which was always granted if the demand was made at once, and before he had left the presence of the magistrate who had pronounced the interdict, 164.

11. *Procedure by arbitrary formula.*—If the defender elected this procedure, the arbiter had to decide whether there were grounds to justify the interdict, 163; if he found there were, he ordered compliance, *ibid.*; if the defender obeyed, he was at once acquitted, *ibid.*; but if he refused to restore or exhibit he was condemned in damages, *ibid.*

12. *Procedure when defender declined reference to an arbiter.*—If the defender had not demanded an arbitrary formula, and yet failed to restore or exhibit, the pursuer challenged him with a spsion, to which he replied with a restipulation (see *Sponsio et restipulatio*) on the question whether there had been breach of interdict, 165; on the spsion and restipulation *formulae* were adjusted, the pursuer getting added to his a remit to the *judex* on the question whether the interdict was justifiable, *ibid.*; if on both issues the judge found for the pursuer, and the defender still refused to restore or exhibit, the latter was condemned not merely in damages but in the amount of the spsion, *ibid.* and correction in *Additions etc.*; what happened if the finding was for the defender, or if, being against him, he obeyed the judge's order, does not appear, the MS. being illegible, *ibid.*, note 2.

## IV. PROCEDURE IN THE DOUBLE INTERDICTS.

13. *First step—each offered violence to the other.*—The beginning of Gaius' account of the procedure in the double interdicts is illegible, 166, note; but, from an observation in § 170, it appears that, as the interdict was equally addressed to both parties, each at once contravened its prohibition by

INTERDICTS—*continued*.IV. PROCEDURE IN THE DOUBLE INTERDICTS—*continued*.

offering pretence of violence (*vis moribus facta, vis ex conventu*) to the other, so as thus to raise the question which of them had in fact committed breach of interdict by doing violence to the party truly in possession,—a circuitous way of determining who was possessor when the interdict was pronounced, 166, note, as amended in *Additions etc.*

14. *Second step—the fructus licitatio and award of interim possession.*—The praetor then assigned the interim enjoyment of the fruits and profits to the highest bidder, 166, who gave security for payment to his adversary of the sum bid—which was regarded not as price but as penalty, 167—in the event of the latter being ultimately successful, 166.
15. *Third step—the sponsiones and formulae.*—Next, each challenged the other to a sponson on the question whether he had committed breach of interdict, and each restituted, (see *Sponsio et restipulatio*), 166; and upon the sponsions and restipulations *formulae* were adjusted and sent to a *judex*, 166a.
16. *The judicia and their results.*—If judgment was for the party who had succeeded in the *fructus licitatio* (the bidding), his adversary had to pay only the amount of the sponson and restipulation, 168: if against him, he had to pay to his adversary the amount of the sponson and restipulation, and the sum bid for the interim enjoyment, and return the fruits drawn or their value, 166a, 167; and if thereupon the possession was not also yielded up, the adversary might recover damages in a *judicium secutorium*, or after process, known as the *judicium Cascellianum*, 166a. But the successful party might, if he pleased, disregard the *fructuaria stipulatio*, i.e. the engagement for payment of the amount of the *fructus licitatio*, and have a separate action in reference to the fruits, known as the *judicium fructuarium*, 169.
17. *The secondary interdict.*—It sometimes happened that the procedure could not thus be explicated, owing to the refusal of one of the parties to offer pretence of violence, bid for the interim enjoyment of fruits, etc.; he was in such a case assumed to be in the wrong, and by an *interdictum secundarium* required, if he had it, to restore the possession to his adversary, if otherwise, to abstain from disturbing him, 170.

INTERESSE, *quanti mea interest*, damages, G. iii, 161.

INTEREST, *usurae*, and fruits and profits were due on a *fideicommissum* if debtor *in mora*, but not on legacies, except those left *sinendi modo*, G. ii, 280 and note.

INTERPRETATIO PONTIFICIUM, G. ii, 42, note; see *Jus Romanorum*.

INTESTATE SUCCESSION (to freeborn citizens), G. iii, 1–38, U. xxvi, xxviii, 7–9; see also SUCCESSION, HEREDITAS, BONORUM POSSESSIO. For succession to freedmen, see *Succession to cit. freedmen*, *Succession to Junian latins*.

#### I. INTESTACY GENERALLY.

1. *When it arose*.—There was intestacy not only when a man had died without a testament, but even when he had made one if it turned out inoperative, G. iii, 13. And this might be due to irregularity in its execution, omission to institute or disinherit *fili sui*, or to its subsequent invalidation, G. ii, 138–146, U. xxiii, 2–4, (see *Testament*, II., IV.); or else to the death of a sole heir during the testator's lifetime or before entry, his loss of *testamenti factio* and consequent incapacity to take, non-fulfilment of the condition under which he was instituted, expiry of the period of cretion without cerniture, or his exclusion by the Julian law on the ground of celibacy, G. ii, 144.
2. *Difference between the civil and praetorian rules*.—In all the above cases there was intestacy by the *jus civile*; but where it was due neither to the entire absence of a testament, omission to institute *fili sui*, nor failure of heirs *ex testamento*, but to irregularity in point of form or the subsequent occurrence of something that invalidated it, the praetors gave the *heredes scripti* possession of the estate according to the tenor of the deed, and disregarded the civil intestacy. See *Bonorum possessio*, 10–12.

#### II. THE INTESTATE SUCCESSION OF THE TWELVE TABLES.

3. *First to sui heredes*.—*Sui heredes* took first, G. iii, 1, U. xxvi, 1; *i.e.* descendants *in potestate*, whether natural or adoptive, who became *sui juris* by their parent's death, G. iii, 2; wife *in manu*, and daughter-in-law *in manu* of a son not *in potestate*, 3; *postumi* (which see), who would have been *in potestate* had they been born during the parent's life, 4; children on whose behalf cause had been proved (see *Causae prob. ex l. Aelia Sentia*, *Erroris causae probatio*) after their parent's death, 5; and sons manumitted from a first or second mancipation (see *Emancipation*, 3), 6. All of these, who did not on the death of the intestate pass into another person's *potestas*, participated in the *hereditas* no matter of what degree of relationship, G. iii, 7, U. xxvi, 2; the division being *in stirpes*, *i.e.* by branches and not by heads, G. iii, 8, U. xxvi, 2.



## INTESTATE SUCCESSION—*continued*.

### II. THE INTESTATE SUCCESSION OF THE TWELVE TABLES—*continued*.

4. *Next to agnates*.—Ulp. says that failing *sui* the inheritance passed to consanguineans, *i.e.* the intestate's brothers and sisters by the same father, and in the third place to agnates, U. xxvi, 1; but consanguineans were just agnates of the first class, and Gai. includes them under that name, G. iii, 9. The justification of Ulpian's distinction may be this,—that in the class of consanguineans both males and females were entitled to succeed, whereas beyond it, in what he calls the class of agnates, females had no right of succession, G. iii, 14, U. xxvi, 6. (Agnate defined in G. i, 156, iii, 10, U. xi, 4, xxvi, 1; see *Agnation*, 1.) Only those were entitled to take who were nearest of degree when the fact of intestacy was ascertained, G. iii, 11, 13; if they declined, the inheritance did not pass to those of the next degree, G. iii, 12, U. xxvi, 5, there being no succession of degrees for agnates under the Tables, *ibid.*; the division therefore was *in capita*, by heads, not by branches, G. iii, 15, 16, U. xxvi, 4. But there was no room for the admission of agnates so long as there was a possibility of *sui*, as when the intestate's widow was pregnant or his son in captivity (which see), U. xxvi, 3.
5. *Lastly to the gens*.—Failing agnates the *hereditas* passed to the intestate's *gens*, G. iii, 17. The Tables did not (and hardly could) carry the succession any farther, 18.
6. *Defects of the system*.—Amongst them were these:—that it excluded emancipated children, G. iii, 19, children who had received a gift of citizenship with their deceased father, but had not at the same time been subjected to his *potestas*, 20, agnates who had undergone *capitis deminutio* even *minima* (see *Cap. dem.*, 2), 21, females more distantly related than sisters, 23, and cognates, including children in relation to their mother and *vice versa*, 24; further, that on failure of agnates of the first degree there was no devolution to those of the next, 22.

### III. THE INTESTATE SUCCESSION OF THE EDICT; see *Bonorum possessio*, IV.

### IV. LATER AMENDMENTS.

7. *Succession between mother and child*.—By the Twelve Tables there was no right of succession between a mother and her children, because they were only cognates; unless indeed she was or had been *in manu* of their father, and then she stood to them *sororis loco*, G. iii, 14, 24, U. xxvi, 7, note 1. The edict only partially amended the defect by recognising a right in cognates on failure of agnates,

INTESTATE SUCCESSION—*continued*.IV. LATER AMENDMENTS—*continued*.

G. iii, 30, U. xxviii, 9. But by the Orphitian Set. it was provided that the inheritance of a mother should belong to her children to the exclusion of agnates, U. xxvi, 7; and the Tertullian Set. gave a mother who had the *jus liberorum* (which see) a right of succession to a child who was survived neither by *sui heredes*, father, nor consanguinean brother, U. xxvi, 8.

IPSO JURE and OPE EXCEPTIONIS distinguished, G. iii, 168, 181; iv, 106, 107, 116*a*.

IRRITANCY of a testament, see *Testament*, 23.

ISLAND rising in a river, to whom it belonged, G. ii, 72; see *Property*, 4.

ITALICA PRAEDIA, *solum Italicum*, land in Italy, or in those parts of the provinces that enjoyed the *jus Italicum*, (which see).

ITERATIO, one of the modes in which a latin acquired citizenship, G. i, 35, as amended in *Additions etc.*, U. iii, 1, 4; see *Junian latinity*, 7.

JAVOLENUS PRISCUS, a Sabinian, praetor in reign of Hadrian, died A.D. 138, G. iii, 70 and note, U. xi, 28.

JUDEX, office and duty of, see *Procedure*, 10.

JUDICATAE, EXCEPTIO REI, a peremptory exception alleging that the question in dispute had already been judicially determined, G. iv, 121; see *Exception*, 9, *Litis contestatio*, *Jud. leg. and imp. cont.*

JUDICATUM, judgment, entitled the judgment creditor, under the system of the *legis actiones*, to proceed against his debtor (who was spoken of as *judicatus*, G. iii, 78, iv, 21) by *manus injectio*,—arrest and imprisonment, G. iv, 21, (see *Legis actiones*, 5). In course of time this practice was abolished, and an *actio judicati* substituted against a debtor who delayed voluntarily to implement a judgment against him; like all those that replaced procedure *per manus injectionem*, it was *in duplum*, G. iv, 21, and the defender bound to give *cautio judicatum solvi*, G. iv, 25, 102; and the result of it was that the creditor had his debtor adjudged to him (*adjudicatus*) to work off his debt, G. iii, 189 and n. 2, 199 and n. 2. If, however, the debtor had funds, real execution might proceed upon the judgment, after expiry of the days of grace, by *missio in possessionem*, etc., G. iii, 78 f., (see *Emptio bonorum*).

JUDICATUM SOLVI, CAUTIO, see *Cautiones etc.*, 2, 4.

JUDICIA BONAE FIDEI, see *Bonae fidei judicia*.

JUDICIA LEGITIMA and IMPERIO CONTINENTIA, G. iv, 103–109.

1. *Judicia legitima*.—Those *judicia* alone were *legitima* which

JUDICIA LEGITIMA and IMPERIO CONTINENTIA—*continued*.

were carried on (*a.*) in or within a mile of Rome, (*b.*) between parties who were all citizens, and (*c.*) before a single *judex*, who also was a citizen, G. iv, 104, 109; but it was immaterial whether the ground of action arose *ex lege*, *i.e.* from statute, or from the praetor's edict, 109. By the Julian judiciary law they expired in eighteen months if judgment was not sooner pronounced, 104 and n. 1; and they were extinguished by *capitis deminutio*, such as *manus* or *adrogatio*, G. iii, 83. Litiscontestation in a *judicium* of this sort, if *in personam* with an *intentio in jus concepta*, (see *Formula*, 3), *ipso jure* extinguished the pursuer's right to a new action on the same grounds, G. iii, 180, 181, iv, 107 and n. 2; but if the *judicium* was *in rem*, or if, being *in personam*, it had an *intentio in factum concepta*, further right of action was not *ipso jure* extinguished, and an exception was necessary, G. iv, 107 and n. 3.

2. *Judicia imperio continentia*.—They were so called because dependent on the *imperium* and not authorised by the *jus legitimum* or *civile*; and included all (*a.*) in which any of the litigants was a peregrin, or (*b.*) that were carried on at more than a mile from Rome, or (*c.*) before recuperators, or (*d.*) a peregrin as sole *judex*, G. iv, 105, 109; it being here again immaterial whether the cause of action was praetorian or statutory, 109. They lasted only during the year of office of the magistrate by whom they were granted, 105; but, being founded not on a *civilis* but a *naturalis ratio*, G. i, 158, they do not seem to have been put an end to by *capitis deminutio* of the pursuer, G. iv, 80. For the same reason litiscontestation in them did not *ipso jure* extinguish the pursuer's right to a new action on the same grounds; but if raised it might be defeated by *exceptio rei in judicium deductae* or *ex rei judicatae*, G. iii, 181, iv, 106 and note.

JUDICIS POSTULATIONEM, LEGIS ACTIO PER, see *Legis actiones*, 3.

JUDICIUM, see *Actions*, 1.

JUDICIUM CALUMNIAE, see *Vexatious litigation*.

JUDICIUM CASCELLIANUM, see *Interdicts*, 16.

JUDICIUM DEDUCTAE, EXCEPTIO REI IN, a peremptory exception alleging that issue had been joined on the same question in a previous action; it was used alternatively with and in the same cases as the *exceptio rei judicatae*, G. iii, 181, iv, 106, 107. See *Litis contestatio*, *Jud. legitima etc.*

JUDICIUM FRUCTUARIUM, G. iv, 69; see *Interdicts*, 16.

JUDICIUM SECUTORIUM, G. iv, 69; see *Interdicts*, 16.

## JULIAN AND PAPIA-POPPEAN LAW.

1. *History*.—The history of the statute is referred to in G. i, 145, note 1 ; but some only of its provisions are recorded by Gai. and Ulp.
2. *Relaxation of the tutela mulierum*.—It relieved from tutory freeborn women with three children and freedwomen with four, G. i, 145, 194, iii, 44, U. xxix, 3 ; and, when a woman's tutor-at-law happened to be a pupil, authorised the appointment of an Atilian tutor in his stead, to aid her in constituting a dowry, G. i, 178, U. xi, 20, (see *Tutory*, 17, 22, 24).
3. *Prohibition of certain marriages*.—It forbade senators and their children to marry their freedwomen, women connected with the stage, and prostitutes, as well as those still more disreputable characters whom no man of free birth was allowed to marry, U. xiii and notes, xvi, 2 ; and declared the survivor incapable of taking anything under the testament of the predeceaser, U. xvi, 2.
4. *Requirement of marriage as the general condition of taking at all under a testament*.—It made marriage the condition of taking under a testament for men under sixty and women under fifty, G. ii, 111, 144, U. xvi, 1, unless of kin to the testator within the sixth degree, U. xvi, 1, and new note in *Additions etc.*—it does not appear *from* what age upwards it was required ; but a man was freed from the penalties of celibacy while absent on state service and for a year thereafter, U. xvi, 1 and n. 2, while a woman was free for two years after her husband's death and eighteen months after divorce, U. xiv and note. Though the statute did not require marriage after fifty and sixty respectively, the Pernician Sct. declared that the penalties of celibacy should adhere permanently to persons unmarried at those ages, U. xvi, 3 and note ; but this was modified by a Claudian Sct., which provided that a man over sixty might still escape them by marrying a woman under fifty, U. xvi, 4. To acquire the right to take the testamentary gift, the celibate had to marry within the time of cretion (see *Cretio*, 2, *Jus capiendi*), U. xvii, 1, xxii, 3 ; if he did not, and he was sole heir, the result was intestacy, G. ii, 144, while, if he was only heir *ex parte* or a legatee, what he failed to take became caducous, U. xvii, 1 (see *Jus capiendi*, *Caducity*).
5. *Requirement of children as the condition of taking in full*.—In order to take in full under a testament, men and women over twenty-five and twenty respectively were required to have at least one child, U. xvi, 1 and note to



JULIAN AND PAPIA-POPPEAN LAW—*continued*.

rubr. of tit. xiii, otherwise, as *orbi*, they forfeited one-half of what had been left them, G. ii, 111, 286a.

6. *Testamentary capacity of husband and wife* *inter se*.—It authorised the survivor of husband and wife to take a tenth of the predeceaser's estate under his testament, simply on the strength of the marriage, with addition of another tenth for each surviving child of a previous marriage, and a tenth for each child of their own—but not more than two—that, though deceased, had yet survived its name-day, U. xv, 1, 2; and he or she might take in addition the usufruct and in certain cases the property of a third part of the predeceaser's estate, U. xv, 3. If they had a child surviving, or had lost one after it had reached puberty, or two that had reached the age of three years, or three that had reached their name-days, or if they had a grant of the *jus liberorum*, then they were entitled to take *inter se* in full, provided their marriage was unobjectionable under the statute, U. xvi, 1, 2, 4.
7. *Rights of patrons in the inheritances of their freedmen*.—The statute augmented the rights of patrons and their male children succeeding to very wealthy freedmen, G. iii, 42; it required freedwomen it had released from tutory, if they made a testament, to leave their patrons a certain share of their property, 44 and note; it gave a patron's daughter who had three children right of challenge of a freedman's testament and of succession to him *ab intestato*, 46, 47 and n. 2, U. xxix, 5; and it gave patronesses who were mothers certain rights in the successions of their freedmen and freedwomen, G. iii, 49, 50 and notes, 52 and note, U. xxix, 6, 7, (see *Succession to citizen freedmen*).
8. *Alteration of the law of vesting*.—The enactment altered the date of vesting of unconditional legacies, and those payable at a fixed date, from the time of the testator's death to that of the opening of his testamentary writings, U. xxiv, 31, (see *Legacy*, 11).
9. *Regulation of caducity*.—Further, it introduced the doctrine of caducity,—making everything that an heir *ex parte* or a legatee failed to take under a testament a lapse, to pass to other heirs and legatees who had children, and failing them to the state, and reserving the *jus antiquum* or right of accretion only in favour of descendants and ascendants of the testator to the third degree, G. ii, 150, 206–208; U. i, 21, xviii, xix, 17, xxiv, 12, xxviii, 7, (see *Caducity*).

JULIANUS, SALVIUS, G. ii, 218, 280, an adherent of the Sabinian school, (see *Sabinians etc.*), and consolidator of the praetorian edict in the time of Hadrian, (see *Praetor*, 2).

JUNIAN LATINITY, G. i, 22-24, 28-35, iii, 56-73; U. i, 10, iii, 1-6.

1. *Definition.*—Junian latinity was the condition which the Junian law (see *L. Junia*) assigned to persons who, not being of bad character, (see *Ded. freedmen*), had been manumitted contrary to or without due observance of the requirements of the Aelia-Sentian law (which see, Nos. 2, 4); under the latter statute they were still *de jure* slaves, though protected by the praetors in the enjoyment of *de facto* freedom; the Junian law declared that they should in future be not only *de facto* but *de jure* free, and that their condition should be similar to that of the colonial latins (see *Col. latinity*, 1); hence their name of Junian latins, G. i, 22, iii, 56, U. i, 10.
2. *How men became Junian latins.*—They became so in the first instance by manumission, (which see). If they married women of their own condition, and did not have themselves made citizens, their children were also Junian latins, U. iii, 1.
3. *Their capacity.*—A Junian latin had *commercium*, and therefore might be a party to a mancipation, U. xix, 4, and hold property on quiritarian title. He had *testamenti factio*, U. xi, 16, and therefore could act either as *familiae emptor*, *libripens*, or witness (see *Testament*, 3, 4), U. xx, 8. He might be instituted heir in an ordinary testament or have a legacy bequeathed to him, U. xxii, 3, though he could not take either while he continued a latin (below, No. 4); even as a latin he could take a *fideicommissum* (which see), G. i, 23, ii, 275, U. xxv, 7; and under a military testament (see *Testament*, 25) he could as a latin take either inheritance or bequest, G. ii, 110.
4. *Their disabilities.*—Though a Junian latin was entitled to take a citizen wife with a view to *causae probatio* (see *Aelia-Sentian law*, 6, 7), yet he had no *conubium* with her, and therefore no *potestas* over his children until cause had been proved and citizenship thereby acquired, G. i, 66, 76. The Junian law forbade him to make a testament, G. i, 23, U. xx, 14; did not allow him to be appointed a tutor under one, G. i, 23, U. xi, 16; and did not allow him to take an inheritance to which he had been instituted or a legacy bequeathed to him, G. i, 23, ii, 110, 275, U. xxv, 7, unless he converted his latinity into citizenship within a hundred days, U. xvii, 1, xxii, 3, (see *Jus capiendi*).

JUNIAN LATINITY—*continued*.

5. *Tutory of latins*.—By the Junian law male latins under puberty and females of any age were in tutelage of those who were their quiritarian owners (see *Quir. ownership*) at the time of manumission, whether those last were their manumitters or not, G. i, 167, U. xi, 19.
6. *Disposal of their estates on death*.—See *Succ. to Junian latins*.
7. *How they could become citizens*.—(a.) By grant of citizenship in answer to a petition to the emperor, U. iii, 2. It might be given *salvo jure patroni*, which implied reservation to his manumitter of right to his estate on his death, G. iii, 72; if given without the patron's knowledge or consent, the latter's right of succession was not prejudiced, unless the latin afterwards proved cause under the Aelia-Sentian law, G. iii, 72, 73. (b.) Proving cause under that enactment was one of the commonest modes of acquiring citizenship, G. i, 29–32a, and note to 29 as amended in *Additions etc.*, U. iii, 3; see *Aelia-Sentian law*, 6, 7, *Causae prob. ex l. Aelia-Sentia*. (c.) Iteration or renewal of the manumission when it had been irregular or by a bonitarian owner only, U. iii, 4, G. i, 35, as amended in *Additions etc.* (d.) Service in the night watch, *militia*, G. i, 32b, U. iii, 5. (e.) Ship-trading, G. i, 32c, U. iii, 6. (f.) House-building, G. i, 33, U. iii, 1. (g.) Flour-milling, G. i, 34, U. iii, 1. (h.) Lastly a freeborn latin woman acquired citizenship by giving birth to a third child, U. iii, 1.

JUPITER, inauguration as a priest of, released the flamen from the *patria potestas*, G. i, 130, U. x, 5, and that without *capitis deminutio*, G. iii, 114. A flamen *Dialis* required to be the offspring of a farreate marriage, and himself married *confarreatione*, G. i, 112. *Jupiter Farreus*, *ibid.*; *Jupiter Tarpeius*, U. xxii, 6; *Jupiter Dapalis*, G. iv, 28 and note.

JUS had many significations, and amongst the most important those of (a.) a system of law or jurisprudence as a whole, e.g. *j. naturale*, G. ii, 65, *j. gentium*, i, 1, *j. civile*, *ibid.*, *j. Quiritium*, ii, 40, *j. Romanorum*, iii, 96, *praetorium*, U. xxii, 24; (b.) the *jus civile* as distinguished from the *jus praetorium*, e.g. *jure factum testamentum*, G. ii, 146, *ipso jure*, 198, *juris iniquitates*, iii, 25, *in jus concepta* and *juris contentio*, iv, 60; (c.) a particular institution of the law in all its parts and consequences, e.g. *confarreatio*, G. i, 112, *agnatio*, 158, *postliminium*, 129; (d.) a particular rule of law, as in *jura populi Rom.*, G. i, 2, *jura condere*, 7, *utimur hoc jure*, 135, *ita jus esto*, ii, 224; (e.) a right or congeries of rights in the abstract, e.g. right

JUS—*continued.*

of succession of agnates, G. iii, 12, child's right of succession, 19, *emendi vendendique jus*, U. xix, 5; (f.) a right in the concrete, *e.g. male nostro juri uti non debemus*, G. i, 53, *pristina jura recipiunt*, 129, *jus eundi agendi*, iv, 3; (g.) the presence of a magistrate, *e.g. in jure cessio*, ii, 24, *in jure vindicare*, iv, 16, *in jus vocare*, 183.

JUS ANTIQUUM used by Ulp. to denote the old *jus adcrescendi* or right of accretion, whereby, on one of several testamentary heirs failing, the others took his share *pro rata*, U. i, 21 and n. 3, (see *Adcretio*, 2). It was displaced by the Julian and Pap. Popp. law, except in favour of certain near kinsmen of the testator's, *ibid.*, U. tit. xviii; and the exception was retained in Caracalla's enactment giving *caduca* to the fisc, U. xvii, 2, (see *Caducity*, 3, 5).

JUS BELLI, G. iii, 94.

JUS CAPIENDI, the right of an instituted heir or of a legatee to take the testamentary gift. By the Junian law a latin could not take unless he became a citizen within a hundred days, G. i, 23, U. xvii, 1, xxii, 3. By the Julian law a *caelebs* could not take at all unless he married within the same period, U. xvii, 1, xxii, 3; but it is not said that the *orbis*, who was allowed to take only one-half of what was left him, G. ii, 286a, was relieved from his disability by birth of a child to him within the same period.

JUS CIVILE is never employed to denote the law of Rome as a whole, the *jus Romanorum*, (which see); but in the texts signifies either (a.) that part of it which was peculiarly Roman, as distinguished from the *jus gentium* or *naturale*, G. i, 1, ii, 65; or (b.) that which was the result of old tradition, the XII Tables and their interpretation, and the legislation of the republic, as distinguished (α) from that derived from the praetor's edicts, ii, 115 and 116, 136, iii, 71, U. xxii, 23, xxiii, 6, and (β) that due to the legislation of the empire, G. ii, 197, 255, U. xxii, 19, xxiv, 11a.

JUS EDICENDI, G. i, 6; see *Praetor*, 1, 2.

JUS GENTIUM, G. i, 1, 52, 82, 86, iii, 93, 132; see also *Peregrinity*.

JUS ITALICUM was a special concession to certain districts in the provinces, one of its features being that lands situate within them might be held in property by private individuals, and that on quiritarian title, as if they had been within the bounds of Italy, G. i, 120, note 2. Lands so privileged, equally with those in Italy, were called *praedia italica*, G. i, 120, *praedia in italica solo*, U. xix, 1; they were *res Mancipi*, *ibid.*, and might be conveyed either by *mancipatio* or *in jure cessio*, G. ii, 31.



**JUSJURANDUM**, a form of contracting that was almost out of date in the time of Gai., G. iii, 89, note, surviving only in the *jurata promissio operarum liberti*, 96a; but there were features about the *sponsio* that seem to indicate that with the *jusjurandum* it had originally a close connection, 92, note.

**JUSJURANDUM CALUMNIAE**, oath of calumny, G. iv, 175, 176; see *Vexatious litigation*.

**JUS LATHI**, see *Colonial latinity*, 2.

**JUS LIBERORUM**.—Statute, and especially the Julian and Pap. Popp. law, made paternity and maternity the condition of various rights, privileges, and immunities. To be a parent of children was the necessary qualification of the Julian law for taking in full under a testament, G. ii, 286a, and qualified in addition for appropriating the caduciary lapses of those who were less fortunate, G. ii, 206, 207, 286a, U. i, 21; and by the same law maternity greatly augmented the rights of a patroness in the successions of her freedmen and freedwomen, testate and intestate, G. iii, 44–47, 50, 52, U. xxix, 3–7. To be the mother of three or four children, in the case of *ingenuae* and *libertae* respectively, entitled a woman to succeed under the Tertullian Sct. to an intestate son or daughter, U. xxvi, 8. By the Julian law three or four children respectively released an *ingenua* or a *liberta* from tutory, G. i, 145, 194, iii, 44, U. xxix, 3; and by an unknown senatusconsult a freeborn latin woman became a citizen on giving birth to her third child, U. iii, 1. The *jus liberorum*—that at least which qualified for taking under a testament—might be conferred by the emperor even in absence of children, U. xvi, 1a.

**JUS NATURALE**, G. i, 156, ii, 65, 70, 73; see also *Naturalis ratio*.

**JUS POSTLIMINII**, the rule whereby a citizen who had been taken captive by an enemy reacquired all his old rights on recrossing the frontier, G. i, 129, 187, U. x, 4, xxiii, 5; see *Captivity apud hostes*.

**JUS QUIRITIMUM**, either the aggregate of rights peculiar to a citizen, and then synonymous with *civitas*, G. i, 32c, 33–35, U. iii, 1, (see *Citizenship*); or a citizen's tenure of property (*ex jure Quir. dominus, alicujus esse ex jure Quir.*) before *in bonis habere* was known, and as distinguished from it afterwards, G. ii, 40, etc., (see *Quiritarian ownership*).

**JUS ROMANORUM**.—The phrase was not common, being used only for the purpose of distinguishing between it and a foreign system, as in G. iii, 96a. That of Rome was composed partly of institutions and doctrines peculiar to it, its *jus*

JUS ROMANORUM—*continued.*

*civile*, and partly of what were common to all nations,—institutions and doctrines of the *jus gentium*, G. i, 1. Some of it was introduced tacitly, (see *Custom*), *ibid.*, G. iii, 82, U. i, 4; much of it resulted from legislation, in the shape either of *leges*, plebiscits, senatusconsults, or imperial constitutions, (see *Statute*, 1), G. i, 2, severally described in 3–5; and of some importance, as an element in the *jus civile* proper was the *interpretatio* of the old statutory law, especially the XII Tables, by the pontiffs and early jurists, G. i, 165, ii, 42, note, iv, 30. Next to statute the edicts of the magistrates, and particularly the praetors, were the largest factor in the law, (see *Praetor*, 2), G. i, 6; and contributed to remove many of the *iniquitates juris civilis*,—doctrines of the earlier system that were inequitable when tested by *naturalis ratio*, G. iii, 25. Another factor was the *Responsa prudentium* in the early empire,—written opinions by jurists of eminence on whom the emperor had conferred the *jus respondendi*, in answer to questions submitted to them by *judices* (who were private citizens, mostly unlearned in the law), and which in many cases had the authority of statute, G. i, 7.

JUSTAE NUPTIAE, JUSTUM MATRIMONIUM, see *Marriage*, 1.

LABEO, M. ANTISTIUS, founder of the Proculian school, a political opponent of Augustus, whose offer of the consulate he declined, G. i, 96, note 1, 135, 138, ii, 231, iii, 140, 183, iv, 59; see *Sabinians and Proculians*.

LANX ET LINTEUM, G. iii, 192 and n. 2, 193; see *Theft*, 5.

LATIN LANGUAGE necessary in a *sponsio* proper, G. iii, 93; also in a legacy, G. ii, 281, U. xxv, 9, though not in a *fideicommissum*, *ibid.*

LATINS,—those of Italy and the *lex Minicia*, G. i, 79; colonial, see *Colon. latinity*; Junian, see *Jun. latinity*.

LATIUM, another name for the *jus Latii*, a pathway to citizenship for colonial latins, G. i, 95; *majus* and *minus Latium* distinguished, 96 and notes. See *Colonial latinity*, 2.

LAW, ROMAN, its sources and channels, G. i, 2–7; see *Jus Romanorum*.

LAW, FOREIGN, see *Foreign law*.

LEGACY, *legatum*, G. ii, 191–245; U. tit. xxiv; see also TESTAMENT, III.

## I. GENERAL DOCTRINES REGARDING LEGACIES.

1. *Meaning of legatum.*—A legacy, *legatum*, was a testamentary bequest in imperative words, *lege*, U. xxiv, 1, and required to be in the latin language, G. ii, 281, U. xxv, 9.

LEGACY—*continued.*I. GENERAL DOCTRINES REGARDING LEGACIES—*continued.*

2. *Deed in which it might be bequeathed.*—It might be left either in a testament, U. xxiv, 1, or in a codicil confirmed by testament (see *Codicil*), G. ii, 270a, though not in one that was unconfirmed, *ibid.*, U. xxv, 8.
3. *On whom it could be charged.*—It was in every case a charge upon the instituted heir, U. xxiv, 21,—so much so that if he was a *filiusfamilias* or a slave it could not be charged upon his *paterfamilias* or owner, U. xxv, 10; to charge it upon a legatee was impossible, G. ii, 271, U. xxiv, 20; to charge it upon the heir's heir was equally so, G. ii, 232, U. xxiv, 16, xxv, 8; and so entirely was it dependent on the institution that if it stood in the testament before the latter it was useless, G. ii, 229, U. xxiv, 15, xxv, 8.
4. *To whom it might be left.*—The legatee was necessarily another person than the heir, U. xxiv, 22, except in *legatum per praeceptionem* (below, No. 28). But he might be either a person *sui juris*, or a stranger *alieni juris*, in which case he acquired for him to whom he was subject, G. ii, 87, U. xix, 19.
5. *Legacy to a person in potestate of the heir, and vice versa.*—It might be left conditionally to some one *in potestate* of the heir, and then its eventual efficacy depended on the consideration whether or not the legatee was still in the heir's *potestas* at the time of vesting (see below, No. 11), G. ii, 244, U. xxiv, 23; if left to the *paterfamilias* or owner of an instituted *filiusfamilias* or slave, similar considerations, according to Gai., came into view, G. ii, 245, while Ulp. held the legacy invalid, U. xxiv, 24.
6. *Legacy to an incerta persona.*—Though a legacy to an *incerta persona* was declared useless unless *sub certa demonstratione*, i.e. under limitation to a specified class, G. ii, 238, U. xxiv, 18, and in particular could not be left to a *postumus alienus*, G. ii, 241, 287, because he was *incerta persona*, 242, yet by statute it might be bequeathed to a municipality, U. xxiv, 8, which nevertheless, as *incerta persona*, could not be instituted heir, xxii, 5, except by one of its freedmen.
7. *Legacy to a peregrin or Junian latin.*—A legacy to a peregrin was useless, G. ii, 284, 285; Gai. and Ulp. both say that a Junian latin could not take one, G. ii, 275, U. xxv, 7; but this refers to his *jus capiendi*,—a legacy to him was *ab initio* valid, but he had to convert his latinity into citizenship before he could take it, U. xvii, 1.

LEGACY—*continued*.I. GENERAL DOCTRINES REGARDING LEGACIES—*continued*.

8. *What might be legated*.—A bequest might be of a share of the hereditary estate, *partitio, legatum partitionis*, G. ii, 254, U. xxiv, 25, in which case the relations between heir and legatee were adjusted by *stipulationes partis et pro parte*, G. ii, 254, U. xxv, 15; or of one or more *res singulae*, U. xxiv, 25; or of a choice of things, *optio legata*, the selection lying with heir or legatee according as the bequest was by vindication or damnation (see below, Nos. 18, 22), U. xxiv, 14; or of a usufruct or quasi-usufruct, U. xxiv, 26, 27.
9. *Effects of adjuncts in the words of bequest*.—An inaccurate description of the thing legated, or a mistake as to the cause of granting, did not affect the validity of a bequest, U. xxiv, 19; an impossible condition nullified it according to the Sabinians, but according to the Proculians was to be held unwritten, G. iii, 98; all admitted that if a bequest was left by way of penalty, *i.e.* to coerce the heir to do something, it was void, G. ii, 235, U. xxiv, 17.
10. *Ademption*.—Ademption might take place either in the testament itself or in a codicil confirmed by it, U. xxiv, 29; but the same form required to be observed as in the bequest, *ibid.* and n. 1.
11. *Vesting*.—If a legacy was unconditional, or unqualified in point of time, it vested according to the old law on the testator's death, but by the Julian and Papia-Poppaeian law only on the opening of the testament, U. xxiv, 31; if conditional—and a *dies incertus* was regarded in testamentary law as a condition, note 1 to U. xxiv, 30, 31—it did not vest until the condition was fulfilled, U. xxiv, 31; if the legatee had not survived the vesting, his heirs had no right to it, U. xxiv, 30, and it became a lapse (see *Caducity*), U. xvii, 1.
12. *The Regula Catoniana*.—It was a general rule in judging of the validity of a legacy—the *Regula Catoniana*—that, if it would have been useless had the testator died the moment after executing his testament, it could not be cured by subsequent change of circumstances, G. ii, 244.

## II. RESTRICTIONS ON INORDINATE BEQUEST.

13. *Consequences of the perfect freedom of the Twelve Tables*.—The Twelve Tables having given testators unlimited freedom of bequest, they often left so much to legatees that there remained little or nothing for the heir; who consequently declined to enter, thus causing intestacy and disappointing the legatees, G. ii, 224.



LEGACY—*continued.*II. RESTRICTIONS ON INORDINATE BEQUEST—*continued.*

14. *Restrictions of the Furian law.*—To remedy the mischief the Furian testamentary law forbade legatees, with certain exceptions, to take more than 1000 *asses* of bequest, under serious penalties for contravention, G. ii, 225, U. i, 2.
15. *The Voconian law.*—This law afterwards provided that no one should take as legacy more than remained to the heir or heirs, G. ii, 226.
16. *The Falcidian law.*—The Furian and Voconian laws having both failed to accomplish their purpose, the Falcidian law enacted that a testator should not legate more than three-fourths of his estate, so that thus at least a fourth might always remain to the heir, G. ii, 227, U. xxiv, 32.

## III. THE FORMS OF LEGACY AND THEIR PECULIARITIES.

17. *The different forms of legacy.*—There were four forms of legating,—vindication, damnation, permission (*leg. sinendi modo*), and preception, G. ii, 192, U. xxiv, 2.
18. *Legacy by vindication.*—A legacy by vindication—of which see styles in G. ii, 193, U. xxiv, 3—was so called because it became the quiritarian property of the legatee, with right to sue for it by *rei vindicatio*, the moment the heir entered, G. ii, 194; although there was a controversy whether the property could thus pass to him against his will, 195, which seems eventually to have been settled in the negative, *ibid.*
19. *What could be thus legated.*—In strictness only those things could be thus legated which belonged to the testator in quiritary right both at the date of his will and at that of his death, G. ii, 196, U. xxiv, 7, unless they were fungibles, and then it was enough that they were his at the latter date, *ibid.*
20. *Effect of the Neronian Set.*—By the Neronian Set. it was declared that where a legacy was invalid in the form in which it was bequeathed, it should be regarded as if left *optimo jure*, i.e. by damnation, G. ii, 197, 218, U. xxiv, 11a; in virtue of this provision a legacy *per vindicationem* of what was only *in bonis* of the testator, or even of a *res aliena*, was sustained as effectual, *ibid.*
21. *Whose was the property of a conditional legacy in this form pendente condicione?*—This was a disputed question, G. ii, 200; as also who was owner of an unconditional one before its acceptance, *ibid.*
22. *Legacy by damnation.*—A legacy by damnation, G. ii, 201, note 1—styles in 201, U. xxiv, 4—was one in which the testator imposed an obligation on his heir to give

LEGACY—*continued.*III. THE FORMS OF LEGACY, etc.—*continued.*

- to the legatee the thing bequeathed, *ibid.*, and which afforded the latter a personal claim against the heir, but no real right in the object of bequest, G. ii, 204.
23. *What might thus be legated.*—As the legatee got no real right there was nothing to prevent a testator legating in this way anything whatever that was *in commercio*, U. xxiv, 8, 9, even a *res futura*, G. ii, 203, or a *res aliena*, 202; and in the latter case the heir was bound to acquire and transfer it, or else pay its value to the legatee, *ibid.*, even though its owner refused to part with it, 262.
24. *Further peculiarities.*—There were these further peculiarities in a legacy by damnation,—that if the thing bequeathed was money, and the legatee wished to release the heir without actual payment, he had to do so *per aes et libram*, G. iii, 175 and note 3; that if paid by mistake, when in fact not due, the heir had no *condictio indebiti*, G. ii, 283,—though Ulp. states the rule as applying to legacies generally, xxiv, 33; and that, if the legacy was definite and the heir disputed it and rendered action necessary, he was condemned *in duplum* (see *Cretio litis infitiatione*), G. ii, 282, iv, 9, 171.
25. *Legacy sinendi modo.*—A legacy by permission—style, G. ii, 209, U. xxiv, 5—was one in which the heir was required to ‘allow the legatee to take’ what was bequeathed, *ibid.*
26. *What might be thus bequeathed.*—Such things might be thus legated as belonged either to the testator himself or to his heir, G. ii, 210, U. xxiv, 10; but even what had never belonged to the testator, and had not become the heir’s until after the testator’s death, might be claimed by the legatee in virtue of the Neronian Sct., G. ii, 212.
27. *How far did it impose obligation on the heir?*—The legatee’s action was only a personal one, directed against the heir, G. ii, 213; and though Gai. says some were of opinion that the heir was not bound to convey the object of the bequest, but merely to ‘allow the legatee to take’ it, 214, this view is inconsistent with the fact that interest was due on a legacy *sinendi modo* if the heir was *in mora*, 280.
28. *Legacy by preception.*—A legacy by preception—style, G. ii, 216, U. xxiv, 6—could in strictness be bequeathed only to one of several heirs, G. ii, 217, who was thereby authorised to take and appropriate some particular item of the inheritance before it came to be divided; consequently, with a single exception, 220, only such things

LEGACY—*continued.*III. THE FORMS OF LEGACY, etc.—*continued.*

as belonged to the testator himself in quiritary right could thus be bequeathed, *ibid.*, U. xxiv, 11, (though if a *res aliena* the bequest would still be valid under the Neronian Sct., G. ii, 220), and the legacy was recoverable in an action for division of the inheritance, 219.

29. *The Proculian view of it.*—Such was the Sabinian view, though not universally accepted, G. ii, 218; that of the other school was that a legacy left in this way to a stranger was to be regarded as one by vindication, and to be subject to the same rules, 221, 222.
30. *Conjoint and disjoint legacies to two or more legatees.*—The same thing might be legated to two or more legatees either conjointly or disjointly,—conjointly when their names were coupled in one and the same bequest, disjointly when there was a separate bequest, though of the same thing, to each, G. ii, 199.
31. *Their effect at common law when left by vindication.*—In a legacy to two or more by vindication, whether conjoint or disjoint, the rule of the common law was that each was entitled to a share, that of him who failed accruing to those who took, G. ii, 199.
32. *When left by damnation.*—In one by damnation the rule differed according as it was conjoint or disjoint: if conjoint, a share was due to each, and that of one who failed remained in the inheritance; if disjoint, the whole was due to each, *i.e.* the thing itself went to one, each of the others being entitled to its equivalent in money, G. ii, 205.
33. *When left by permission or preception.*—According to some the rule was the same in a legacy *sinendi modo*; while others held that the heir's obligation was exhausted when he had allowed any one of them to take, G. ii, 215. In a joint legacy by preception the rule was the same as in one by vindication, 223.
34. *Papian modifications.*—Such was the common law; but it was considerably modified by the provisions of the Julian and Papia-Poppaeian law as to lapses (see *Caducity*, 3), G. ii, 206–208.

LEGARE, probable etymology, G. ii, 104, note 8.

LEGES.—The following *leges* and *plebiscita*—for the distinction was not observed in their names—are mentioned in the text and notes, (those referred to only in the latter being marked with an asterisk):—

*L. Aebutia*, about the year 507 | 247, introducing the system

## LEGES—continued.

- of procedure *per formulas*, G. iv, 30 and n. 1. See *Procedure*, 2.
- L. Aelia Sentia*, A.D. 4, regulating manumissions, G. i, 13 and n. 1, 18, 21 (?), 21a (?), 22 (?), 27, 29, 31, 37, 38, 40, 47, 66, 68, 70, 71, 80, 139; iii, 5, 73, 74, 75; U. i, 1 (?), 11–15, vii, 4. See *Aelia-Sentian law*.
- L. Apuleia*, date uncertain, ameliorating the position of sureties, G. iii, 122 and note. See *Suretyship*, 3.
- L. Aquilia*, probably 467 | 287, giving action for wrongful damage to property, G. iii, 202, 210 and note, 211–219; iv, 9, 37, 76, 109. See *Wrongful damage to property*.
- L. Atilia*, date uncertain, but before 568 | 186, empowering magistrates in Rome to appoint tutors, G. i, 185 and n. 1, 195, 195b; U. xi, 18. See *Tutory*, 4, 13, 22.
- \**L. Atinia*, 557 | 197 (?), prohibiting usucapion of *res furtivae*, G. ii, 45, note 1. See *Usucapion*, 5.
- L. Bithynorum*, a local statute on tutory of women, G. i, 193.
- L. Calpurnia*, date uncertain, extending the *legis actio per condictionem* to *omnis res certa*, G. iv, 19 and note. See *Legis actiones*, 4.
- \**L. Canuleia*, 309 | 445, repealing prohibition of intermarriage of patricians and plebeians, G. i, 3, note 2.
- L. Cicereia*, probably 581 | 173, imposing certain duties upon creditors accepting sureties from their debtors, G. iii, 123. See *Suretyship*, 3.
- L. Cincia*, 550 | 204, prohibiting inordinate donations, U. i, 1 and note; G. iii, 121, note.
- L. Claudia*, A.D. 47, abolishing the agnatic tutory of women; probably a senatusconsult, G. i, 157 and n. 1, 171; U. xi, 8. See *Tutory*, 2.
- \**L. Coloniae Juliae Genetivae*, Julius Caesar's charter to a latin colony in southern Spain, G. i, 22, note 1, iii, 78, note 2.
- L. Cornelia (de sicariis?)*, G. i, 128 and n. 1.
- L. Cornelia (de sponsu)*, date uncertain, in favour of sureties, G. iii, 124 and note. See *Suretyship*, 3.
- L. Cornelia (de captivis)*, date uncertain, enacting that if a citizen died in captivity, a testament made before his capture should still be valid, U. xxiii, 5. See *Captivity apud hostes*.
- L. Creperia (?)*, date uncertain, fixing the amount of the *sponsio* in centumviral causes at 125 sesterces, G. iv, 95 and n. 4. See *Legis actiones*, 2.
- \**L. de imperio Vespasiani*, G. i, 5, note 2.
- L. Duodecim Tabularum*. See *Twelve Tables*.
- L. Falcidia*, 714 | 40, empowering a testamentary heir to retain



## LEGES—continued.

- one-fourth of the inheritance, even though more than three-fourths had been left in legacies, G. ii, 227 and note, 254; U. xxiv, 32, xxv, 14. See *Legacy*, 16.
- L. Fufia Caninia*, possibly A.D. 8, restricting testamentary manumission, G. i, 42 and note, 43–46, 139; ii, 228, 239; U. i, 24, 25. See *Manumission*, 11.
- L. Furia* (?), G. iv, 109.
- L. Furia (de sponsu)*, date uncertain, ameliorating the position of sureties, G. iii, 121 and note, 121a, 122; iv, 22. See *Suretyship*, 3.
- L. Furia (testamentaria)*, 571 | 183 (?), restricting legacies to a certain maximum, G. ii, 225 and notes; iv, 22–24; U. i, 2, xxviii, 7. See *Legacy*, 14.
- L. Hortensia*, 467 | 287, on authority of plebiscits, G. i, 3 and note 1.
- L. Julia*, see *L. Julia et Papia-Poppaea*.
- L. Julia caducaria*, see *L. Julia et Papia-Poppaea*.
- L. Julia (de adulteriis)*, 736 | 18, *inter alia* prohibiting alienation by a husband of his wife's dotal lands, G. ii, 63. See *Dowry*, 3.
- L. Julia (de bonorum cessione)*, reign of Augustus (?), G. iii, 78 and n. 2.
- L. Julia de maritandis ordinibus*, see *L. Julia et Papia-Poppaea*.
- L. Julia de vi*, 708 | 46, G. ii, 45 and n. 2.
- L. Julia de vicesima hereditatium*, A.D. 6, imposing a 5 per cent. duty on testamentary successions, G. iii, 125 and note.
- Leges Juliae judicariae*, in reign of Augustus, completing the work of the *L. Aebutia* in abolishing the procedure *per leges actiones*, G. iv, 30 and n. 2, 104 and notes.
- L. Julia et Papia-Poppaea*, (under names of *L. Julia*, *L. Julia caducaria*, *L. Julia de maritandis ordinibus*, *L. J. et P. P.*, *L. Papia*, or *L. Papia-Poppaea*), G. i, 145 and note, 178; ii, 111, 144, 150, 206–208, 286, 286a; iii, 42, 44, 46, 47, 49–53; U. i, 21; xi, 20; xiii, 1; xiv; xvi, 1–3; xvii, 1; xviii; xix, 17; xxii, 3; xxiv, 12, 31; xxviii, 7; xxix, 3, 5–7. See *Julian and Papia-Poppean law*.
- L. Julia et Titia*, about 722 | 32, giving magistrates in the provinces power to appoint tutors, G. i, 185 and n. 2, 186, 187, 195, 195b; U. xi, 18. See *Tutary*, 4, 13, 22.
- \**L. Julia Papiria*, 324 | 430, converting cattle penalties into money penalties, G. iv, 95, note 4.
- L. Junia*, A.D. 19 (?), defining the position of informally manumitted slaves, previously only *de facto* and not *de jure* free, G. i, 22 and n. 2, 23, note to 29 as amended in

## LEGES—continued.

- Additions etc.*, 80, 167; ii, 110, 275; iii, 56, 57, 70; U. i, 10; iii, 3; xi, 16, 19; xx, 14; xxii, 3. See *Junian latinity*.
- L. Junia Vellaea*, date uncertain, on testamentary institution and disherison, G. ii, 134 and n. 1, as amended in *Additions etc.*; U. xxii, 19.
- \**Leges Liciniae*, 387 | 367, *inter alia* opening consulate to plebeians, G. i, 6, note 1.
- \**L. Malacitana*, Domitian's charter to the *municipium* of Malaga, G. i, 22, note.
- L. Marcia*, 402 | 352, to suppress usury, G. iv, 23.
- L. Minicia* (or *Mensia*), date unknown, on status of children born of parents of unequal condition, G. i, 78 and note, 79; U. v, 8. See *Status*, 2.
- L. Ollinia* (?), G. iv, 109.
- L. Papia-Poppaea*. See *L. Julia et Papia-Poppaea*.
- L. Pinaria*, date uncertain, amending the law of sacramental procedure, G. i, 15 and n. 2.
- \**L. Plaetoria*, 6th cent. *p. u. c.*, introducing curatory of minors in certain cases, G. i, 197, note. See *Curatory*, 3.
- L. Plautia de vi*, date uncertain, but before 691 | 63, G. i, 45 and n. 2.
- \**L. Poetilia*, 429 | 325 or 441 | 313, probably the latter, alleviating the condition of the *nexi*, G. iv, 21, note 6.
- L. Publilia (de sponsu)*, 371 | 383 (?), giving sponsors, who had paid for the debtor for whom they had become sureties, the right of *manus injectio* against him; for which was afterwards substituted an *actio depensi* for twice the amount, G. iii, 127, iv, 22. See *Suretyship*, 3.
- \**L. Publilia Philonis*, 415 | 339, *inter alia* conferring legislative powers on the *comitia tributa*, G. i, 3, note 2.
- \**L. Rubria de Gallia Cisalpina*, between 705 | 49 and 712 | 42, settling the constitution of the province, G. iii, 78, note 3.
- \**L. Salpensana*, Domitian's charter to the *municipium* of Salpensa in southern Spain, G. i, 22, note 1, 55, note 2.
- L. Silia*, date uncertain, introducing the *legis actio per condictionem*, G. iv, 19 and note. See *Legis actiones*, 4.
- L. Titia*, see *L. Julia et Titia*.
- \**L. Valeria Horatia*, 305 | 449, *inter alia* instituting the *comitia tributa*, G. i, 3, note 2.
- L. Vallia*, date unknown, amending procedure by *manus injectio*, G. iv, 25, iii, 121, note. See *Legis actiones*, 5.
- L. Visellia*, A.D. 24 (?), granting citizenship to latins after six years' service in the night watch, G. i, 32*b* and note, U. iii, 5; see *Junian latinity*, 7.

LEGES—*continued.*

*L. Voconia*, 585 | 169, imposing disabilities upon women in the matter of succession, and forbidding legatees to take more than a certain amount under a testament, G. ii, 226 and note, 274. See *Testament*, 13, *Legacy*, 15.

LEGIS ACTIONES, G. iv, 11–29; see also *Procedure*.

1. *Legis actio what?*—It included not only contentious but also certain non-contentious procedure, such as *in jure cessio* (which see), G. ii, 24; but in G. iv, 11–29, it is the former alone that is dealt with. The phrase applied either to the mode of procedure, as *leg. actio sacramento*, or to some particular action proceeded in by that or other mode, 11, note; and in the latter sense was so called either because sanctioned by statute, *lege*, or because the *ipsissima verba* of the law founded on had to be recited, *ibid.*, any variance causing failure, *ibid.* There were five different modes of procedure that went under the name, —the *legis actio sacramenti* (or *sacramento*), 13–17, that *per judicis postulationem*, 12, note, that *per condictionem*, 17b–20, that *per manus injectionem*, 21–25, and that *per pignoris capionem*, 26–29; and, with exception of the last, they could proceed only *in jure*, in the presence of the adversary, and on a lawful day, 29.
2. *The legis actio sacramento.*—This was followed where no other was prescribed by statute, G. iv, 13, and was applicable both in real and personal actions, *ibid.*, note 1. Its characteristic feature was that the parties, after dramatically stating their respective contentions before a magistrate, and originally perhaps a pontiff, each challenged the other with a sacrament,—at first probably an oath of verity backed with a money-stake, afterwards only the stake. The direct question for determination by the *judex* to whom it was remitted was—whose sacrament is just, whose unjust? the unjust one becoming a forfeit for public uses, the other being resumed by the staker. But its decision involved a judgment on the actual matter of dispute, (followed when necessary by a *litis aestimatio*, 48, note 3), which was enforced in subsequent proceedings by *manus injectio*, 13–17 and notes, 21. These were steps in the procedure that were taken in all cases, 13–15. For those that were peculiar to vindications, and in particular the disposal of the interim possession and the *praedes litis et vindiciarum*, see 16, 17 (incomplete), 94; those peculiar to personal actions seem to have been explained in 15, (also incomplete). The procedure survived the establishment of the formular

LEGIS ACTIONES—*continued.*

- system only in certain centumviral causes, 31, and with considerable modifications, 95.
3. *That per judicis postulationem.*—The account of it is lost, G. iv, 17*a*, note ; but it appears to have been a competent mode not only of deciding amicable disputes and illiquid claims, but also of trying those for *certa pecunia* or other *res certae*, 20.
  4. *That per condictionem.*—It was introduced by the Silian law to meet the case of claim for a definite sum of money, *certa pecunia*, and extended by the Calpurnian law to claims for specific articles generally, *omnis res certa*, G. iv, 19 and note. It was so called because the pursuer *adversario condicebat*, cited his adversary, to appear before the magistrate on a certain day for appointment of a judge, 17*b*, 18. Its advantage over the *actio sacramento* was its simplification of the procedure *in jure*, 20 and note.
  5. *That per manus injectionem.*—This was authorised by the XII Tables against judgment debtors, and those indebted *damnatione* either under a statute or a private deed, G. iv, 21 and note, ii, 201, note 1. The creditor was entitled, using certain words of style, to arrest his debtor, and carry him home and imprison him and put him in chains, unless he then and there provided a *vindex* to undertake the responsibility of his defence,—for he was not allowed to say a word for himself, G. iv, 21 and n. 5, 25. Later enactments sanctioned *man. inject. pro judicato* in a variety of cases, of which one or two illustrations are given in 22 ; while others allowed what was called *manus injectio pura*, 23, whose peculiarity was that the arrested debtor was not required to find a *vindex*, but might defend in person, 24. This right was latterly extended by a *lex Vallia* (?) to all but *judicati* and debtors who failed within six months to relieve sponsors (sureties) who had paid for them, 25. What was the form of the defence is not explained ; all that is stated is that the debtor was entitled *pro se agere*, 25, *pro se lege agere*, 24.
  6. *That per pignoris capionem.*—The proceedings here were by distress, taking and selling some article belonging to a debtor ; they were authorised in a few cases by custom, G. iv, 27, and in a few others by statute, 28. It was accounted a *legis actio* because the distrainer had to use certain words of style, 29 ; but differed from the others in respect that it did not proceed before a magistrate, and was competent on a *dies nefastus*, *ibid.* Under the later



LEGIS ACTIONES—*continued*.

system it was sometimes referred to in a *formula* as justification of the action upon which the *formula* was adjusted, 32.

7. *Defects of the system*.—*Inter alia* agency was not allowed in a *legis actio*,—no one could sue for another except *pro populo*, *pro libertate*, *pro tutela*, G. iv, 82. Equitable exceptions were unknown, 108; (was there any substitute? 108, note). It gradually fell into discredit because of its many pitfalls for unlearned litigants, and was replaced by the formular system, 30.

LEGIS VICEM OPTINERE, G. i, 4, 5, 83; iv, 118.

LEGITIMA COGNATIO, G. iii, 110; *legitimum jus agnationis*, G. iii, 27, U. xxviii, 9. See *Agnation*.

LEGITIMA MANUMISSIO, G. i, 17, U. i, 6; see *Manumission*, 1, 4.

LEGITIMI HEREDES, LEGITIMA HEREDITAS, agnates and their succession under the XII Tables; see *Intestate succession*, 4.

LEGITIMUM JUDICIUM, see *Jud. leg. et imp. cont.*, 1.

LEX, G. i, 3, etc., was a comitial enactment; see *Statute*. The phrase *lex publica* occurs once or twice, (G. ii, 104, iii, 174); it may have meant no more than *lex*, but probably meant the XII Tables.

LEX (PRIVATA), the law men made for themselves or their heirs, in contracts, conveyances, testaments, etc., G. ii, 104, note 8, U. xxiv, 1: *lex mancipii*, G. i, 140, 172; *lex locationis*, G. iii, 145, 146; *lex testamenti*, U. xxiv, 1.

LIBELLUS, a slanderous writing, G. iii, 220.

LIBERORUM JUS, see *Jus liberorum*.

LIBRIPENS, G. i, 119, ii, 104, iii, 174, (see *Aes et libra*); who could or could not act as such in a testament, G. ii, 107, 108, U. xx, 3–8.

LICIUM, see *Linteum*.

LIMITATION OF ACTIONS, see *Actions*, 9.

LINTEUM, LANX ET, G. iii, 192 and n. 2; see *Theft*, 5.

LITEM SUAM FACIT was said of a judge who, through error in point of form, rendered his judgment in favour of a pursuer useless; the latter was then entitled to proceed against the judge for damages, fresh action against his debtor being excluded by the novation implied in *litiscontestatio*, G. iv, 52 and n. 2.

LITERAL OBLIGATIONS, G. iii, 128–134; see also *Contract*, 1.

1. *How created*.—Literal obligations were created by *transscriptio* in a citizen's *codex expensi et accepti*, G. iii, 128 and note; they were unilateral, 137, and the entries creating them might be made by the creditor in the absence of his debtor, 138. The entry, or *nomen*, might be transcribed

LITERAL OBLIGATIONS—*continued*.

either *a re in personam*, when the amount of an already existing illiquid debt was booked against the debtor (*expensi latio*), 129 and note; or *a persona in personam* when a creditor gave his debtor credit for a sum standing at his debit (*accepti latio*), and entered it to the debit of a third party delegated to him by his debtor for that purpose, 130. Those *nomina* were peculiar to citizens, although the Sabinians were of opinion that a peregrin might be made debtor in one *a re in personam*, 133 and note.

2. *Nomina arcaria, chirographa, and syngraphae*. — *Nomina arcaria* were not literal obligations, but merely book-record and evidence of real ones, G. iii, 131 and note, 132. *Chirographa* and *syngraphae* were peculiar to peregrins, and with them reckoned as literal obligations, 134 and note.

LITIGIOSITY, exception of, G. iv, 117a.

LITIS CONTESTATIO.—Origin of the phrase, and how the *contestatio* was marked in process, G. iii, 180, note 1. Its effect was to extinguish a claim when sued for in a *legitimum judicium* (see *Jud. legitima etc.*, 1) *in personam*, with a *formula in jus concepta* (see *Formula*, 3), G. iii, 180 and note to 180 and 181, iv, 107. It has consequently been called processual novation, note to G. iii, 180 and 181; for the defender then began to be bound by his agreement to refer the matter to judicial decision, 181, just as on judgment he began to be bound thereby, his obligation under the *litiscontestatio* being extinguished, *ibid*. When therefore a creditor had carried such an action as far as *litiscontestatio*, his right to sue afresh on the same claim was *ipso jure* extinguished, 181. Not so in a *jud. legit. in rem*, because there was no obligation to be novated; nor in a personal one *in factum concepta*, because no obligation was averred; nor yet in a *jud. imp. continens*, because the *civilis ratio* could not affect the praetorian remedy: but if an action of any of those classes had reached *litiscontestatio*, and the pursuer afterwards sued afresh on the same grounds, he might be defeated by an *exceptio rei in judicium deductae*, G. iii, 181, iv, 106.

LOAN OF FUNGIBLES (or for consumption), see *Mutuum*; of non-fungibles (or for use), see *Commodate*.

LOCATION, *locatio conductio*, G. iii, 142–147; see also *Consensual obligations*.

1. *Location, what?*—It was a consensual contract, G. iii, 135,

LOCATION—*continued*.

whereby the *locator*, in consideration of a fixed reward, *certa merces*, 142, agreed to give the *conductor* the use of a thing, *locatio conductio rei*, 144, 145, or the benefit of his services or those of his people, *loc. cond. operarum*, 146, 147. It was subject to much the same general rules as sale, 142; and the same questions seem to have been raised in both, in particular whether there was location when the remuneration of the *locator* was left to be fixed by a third party named, or to be settled by parties subsequently, 143; as also whether it was location when the use of one thing was given in exchange for the use of another, 144, (see *Sale*, 2).

2. *The resulting rights and obligations*.—The transfer following on the contract did not give the *conductor* the legal possession of what was given him in location; he was only the holder for the *locator*, who remained in possession through him, G. iv, 153. But he was responsible for its safe-keeping; consequently if it was stolen, and he solvent, it was he and not the *locator* that had the *actio furti*, G. iii, 205, 206. Each party had an action on the contract,—the *a. locati* for the one, the *a. conducti* for the other; and both of them were *bonae fidei*, G. iv, 62.
3. *Occasional difficulty in discriminating between location and sale*.—In emphyteusis, when lands were granted to a man and his heirs in perpetuity so long as they paid the annual *vectigal*, it was long disputed whether the contract was sale or location; according to the prevailing opinion it was the latter, 145. Again, when an order was given to a manufacturer there was the same difficulty; it was ruled that if he was to supply both material and workmanship the contract was one of sale, but that if the material was furnished him, and he was to give labour only, it was location, 147. In some cases it was held impossible to determine from the first what was the contract, and that only supervening occurrences could show whether it was sale or location, 146.

LUNACY incapacitated a man from doing any act productive of jural consequences, G. iii, 106; not only could he not be a party to a contract, *ibid.*, or make a testament, U. xx, 13,—he could not even assist at the execution of another person's testament as *familiae emptor*, *libripens*, or witness, U. xx, 7. By the XII Tables he was placed under the curatory of his agnates, (see *Curatory*, 1), U. xii, 2; and their powers were so extensive that they could even alienate his estate, G. ii, 64.

MAGISTER (trustee) in bankruptcy, G. iii, 79; see *Emptio bonorum*.

MALE *nostro jure uti non debemus*, G. i, 53.

MANCIPATIO, G. i, 119–122, U. xix, 3–6.

1. Mancipatio, *what?*—In form it was an imaginary sale *per aes et libram* (see *Aes et libra*), in presence of five citizens as witnesses, and a *libripens* holding a pair of scales; the party to whom the conveyance was being made, *qui mancipio accipit*, having one hand on the thing being conveyed, and using certain solemn words of style, declared it his by purchase with an *as* (which he held in his other hand) and with the copper scales; and simultaneously he touched the scales with the coin, which he then gave to the party conveying, *qui mancipat*, G. i, 119. The ceremony was the remnant of the old procedure when the price of a purchase was so much copper actually weighed in the scales, 122; but the name Gai. says was due to the fact that the transferee laid his hand upon what was being mancipated, *quia manu res capitur*, 121. This was the case, however, only with moveables, which moreover could be mancipated only one at a time, U. xix, 6; immoveables might be mancipated in absence and in any number, *ibid.*
2. *To what purposes applied.*—As a conveyance of property it applied properly to *res Mancipi* (which see), G. i, 120, ii, 22, U. xix, 3, including rural praedial servitudes, G. ii, 29; and was preferred to *in jure cessio* because of its greater convenience, G. ii, 25. But free persons might also be mancipated; e.g. children *in potestate* who were being surrendered *ex noxali causa* (see *Noxal actions*), G. iv, 79, or emancipated, G. i, 132, or given in adoption, 134; also women in passing *in manum* by *coemptio*, 113, (although the words used were not the same as usual, 123), or in being released from it by remancipation, 118, 137a. The same form, but with different words, was used likewise in a testament *per aes et libram* (see *Testament*, 4), G. ii, 102, U. xx, 2, 9.
3. *To whom it was competent.*—It was peculiar to citizens, G. i, 119, but competent also, as a conveyance of property, to colonial and Junian latins, and such peregrins as had obtained a concession of *commercium*, U. xix, 4, 5 and note. A slave or a *filiusfamilias* might acquire by it, G. ii, 87, iii, 167, declaring in the words of style that the purchase was for his *paterfamilias*, iii, 167.
4. *Reservations and concurrent agreements.*—It might be made under a reservation, as when lands were mancipated under deduction of their usufruct, G. ii, 33. Or it might



MANCIPATIO—*continued*.

be accompanied by some relative agreement, such as a *pactum fiducia* (see *Fiducia*), G. ii, 59, 60, 104, note 8, iii, 201.

MANCIPI RES, see *Res Mancipi* and *nec Mancipi*.

MANCIPII, PERSONS IN CAUSA, or *in Mancipio*, (the latter locution being the more frequent in Gaius), G. i, 116–123, 138–141.

1. *Who were in causa Mancipii*.—A slave was a *Mancipium*, G. iii, 148; but it was free persons that were *in Mancipio* or *in causa Mancipii*, G. i, 117, 118, and thus *servorum loco*, G. i, 123, 138, viz. *filiifamilias* who had been noxally surrendered, 140, iv, 79; *filiifamilias* and *filiaefamilias* who had been mancipated with a view to emancipation or adoption, but had not yet been manumitted in the one case (see *Emancipation*, 1) or ceded *in jure* in the other (see *Adoption*, 3), G. i, 132, 134; and women who had been remancipated by their coemptionators with a view to dissolution of *manus*, but were still unmanumitted, 118. Except in the case of those mancipated noxally, their condition was usually a transient one, and one rather of form than substance, 141.
2. *Their position*.—They were subject generally to the same disabilities as other persons *alieni juris* (see *Alien. jur. personae*, 2–4); only as they were not in possession of the individual to whose jus they were subject, it was doubted whether they could possess and usucapt on his behalf, G. ii, 90. If a person *in Mancipio* was instituted heir or had a legacy left him by the person in whose *Mancipium* he was, it required to be accompanied with freedom, otherwise he could not take it, G. i, 123. Such an institution made him a necessary heir; but nevertheless he had the *beneficium abstinendi* (see *Abst. potestas*), though he was not at the same time a *suus*, G. ii, 160. In consideration of his freedom he to whom he was subject was not allowed to offer him any indignity, on pain of an *actio injuriarum*, G. i, 141.
3. *How they were relieved from it*.—They were relieved from it, like slaves, by manumission *vindicta*, *censu*, or *testamento* (see *Manumission*, 6), G. i, 138; but to their case the restrictions of the Aelia-Sentian and Fufia-Caninian laws did not apply, 139. Except a *filiusfamilias* surrendered noxally, or a child mancipated under trust for remancipation to his father (see *Emancipation*, 3), they might have their names recorded in the censorial register even against the will of the person to whom they were subject, and thus regain freedom *de facto* as well as *de jure* without his co-operation, 140.

MANDATE, *mandatum*, G. iii, 155-162; see also *Consensual obligations*.

1. *Mandate, what?*—It was a consensual contract, G. iii, 135, in which the mandatory was commissioned by the mandant to do something, and in which they stood mutually obliged according to principles of good faith, 155. It was of necessity gratuitous, the contract being one of location if the mandatory was paid for his services, 162.
2. *Nature of the commission*.—A mandate might be on account either of the mandant or of a third party, or for their joint benefit, G. iii, 155, 156; but if solely for the benefit of the mandatory it was regarded merely as advice, and entailed no responsibility *ex mandato*, 156. A commission to do what was immoral or unlawful created no obligation, 157, neither did one to be performed after the mandant's death, 158.
3. *How extinguished*.—It was extinguished by revocation or death of either party *rebus integris*, G. iii, 159, 160; but if the commission was executed in excusable ignorance of the mandant's death, the mandatory still had his *actio mandati*, 160.
4. *Mandatory not entitled to exceed the limits of his commission*.—If the mandatory exceeded the limits of his commission the mandant might have an *actio mandati* against him for damages; but he had no action against the mandant, G. iii, 161. The mandatory was still entitled, however, to action when he was within his limits, as in buying at a lower price than he had been authorised to give, *ibid*.
5. *The actio mandati*.—The *a. mandati*, which was competent to either party, G. iii, 111, 127, 156, 161, was *bonae fidei*, G. iv, 62, and condemnation in it made the defender infamous, 182. It was the action which a surety other than a sponsor used against the debtor on whose behalf he had paid, G. iii, 127; and a sponsor might use it as alternative to his *a. depensi*, *ibid.*, (see *Suretyship*, 5). It was also employed by a stipulant or his heirs against an adstipulator (see *Adstipulation*, 2) who had received payment from the common debtor, 111.

MANES, DII, G. ii, 4; see *Things*, 1.

MANIFESTUM FURTUM, see *Theft*, 4, 5.

MANUMISSION, enfranchisement of a slave, G. i, 13-27, U. i, 6-25, ii, (see *Slavery*), or liberation of a free person *in causa mancipii*, G. i, 138-141, (see *Mancipii etc.*).

#### I. GENERAL DOCTRINES REGARDING MANUMISSION OF SLAVES.

1. *The Aelia-Sentian and Junian laws*.—Before the first of these enactments only a quiritarian owner (see *Quir. ownership*) could legally manumit his slave, and that by

MANUMISSION—*continued*.I. GENERAL DOCTRINES REGARDING THAT OF SLAVES—*continued*.

one or other of the *legitimae manumissiones*, i.e. either *vindicta*, *censu*, or *testamento*; the slave thus manumitted became a citizen, without reference either to his own age or that of his manumitter, G. i, 17, 18, 38. To check this increase of freedmen citizens, the statute *inter alia* declared that slaves of disgracefully bad character should not on manumission become or be capable of becoming citizens, and introduced restrictions as to the mode and conditions of manumission when a slave was under thirty or his owner under twenty, G. i, 13, 18, 38, U. i, 11, 12, 13, (see *Aelia-Sentian law*, 2-4). But it at the same time provided a means whereby slaves under thirty manumitted by their quiritarian owners without due regard of its directions might afterwards attain citizenship, G. i, 29; which was extended by the Junian law and a subsequent senatusconsult to slaves of any age manumitted irregularly, or by those who were only their bonitarian owners, G. i, 29, note, as amended in *Additions etc.*, 31, U. iii, 3, (see *Aelia-Sentian law*, 6, 7). Those to whom this means of obtaining citizenship were offered got the name of Junian latins until they had obtained it, G. iii, 56, (see *Junian latinity*, 1).

2. *How manumission was influenced by the condition of the manumitter*.—Only a quiritarian owner could by manumission make his slave a citizen, G. i, 17, U. i, 23; a bonitarian owner (see *Bon. ownership*) could make him no more than a latin, G. i, 22 and note, U. i, 16. An owner under twenty, even quiritarian, could not make his slave a citizen unless by manumission *vindicta*, for reasons recognised by the *consilium* as sufficient, G. i, 38-41, U. i, 13. A pupil or a woman in tutelage could not manumit to any effect without tutorial *auctoritas*, U. i, 17. One only of two joint owners did not free his slave by manumission; the result was that his share accrued to his *socius* if the manumission was regular, but had no effect if irregular, U. i, 18. Manumission by the owner of a slave usufructed by a third party left him *servus sine domino* while the usufruct lasted, U. i, 19. Manumission by any owner in fraud of creditors or patron was null, G. i, 37, 47, U. i, 15.
3. *How influenced by condition of the slave*.—If he was of disgracefully bad character his manumission, except by an insolvent owner instituting him as his *heres necessarius*, U. i, 14, could make him no more than a deditician, G. i, 13, U. i, 11, (see *Ded. freedmen*). If under thirty, his manu-

MANUMISSION—*continued*.I. GENERAL DOCTRINES REGARDING THAT OF SLAVES—*continued*.

mission otherwise than *vindicta apud consilium*, and by his quiritarian owner, made him only a latin, G. i. 18, U. i. 12.

4. *How influenced by mode of manumission*.—Only one or other of the *legitimae manumissiones* could make a slave a citizen, G. i. 17, U. i. 6–9; and if he were under thirty or his owner under twenty it required to be *vindicta*, on cause approved by the council, (see No. 2). Any other mode of manumission made him only a latin, G. i. 22 and note, U. i. 10.

5. *Result*.—The slave who became a citizen had all the rights of a citizen except as qualified by his relation to his manumitter, who became his patron; see *Patronate, Succession to citizen freedmen*. For the rights and disabilities of a Junian latin, see *Junian latinity, Succession to Junian latins*.

## II. MANUMISSION OF SLAVES BY ACT INTER VIVOS.

6. *The legitimae manumissiones*.—These were *vindicta* and census, G. i. 17, U. i. 6. Manumission *vindicta* was a formal act before a magistrate, U. i. 7, the nature of which is not explained by Gai. or Ulp., except that in the ordinary case it could take place at any time, and did not require to be in court, G. i. 20. It was the only form that could make a slave a citizen when he was under thirty or his owner under twenty, G. i. 18, 38, U. i. 12, 13, and then it required to be on adequate cause approved by the council, *ibid.* The composition of the council and its times of sitting are described in G. i. 20, U. i. 13, (see *Consilium*), and what were regarded as adequate causes enumerated in G. i. 19, 39. Manumission *censu* was accomplished when a slave, by order of his owner, gave in his name for enrolment in the census list, U. i. 8.

7. *Informal manumissions*.—Gai. and Ulp. mention only manumission *inter amicos*, G. i. 41, 44, U. i. 10, 18; but those *per epistulam* and *per mensam* were very common, G. i. 41, note.

## III. MANUMISSION OF SLAVES BY TESTAMENT.

8. *Direct manumission*.—It was only his own slave that a man could directly (in contradistinction to fideicommissarily) manumit by testament, G. ii. 272; and to make him a citizen it was necessary (a) that he should be in the quiritarian ownership of the testator both when the latter made his testament and when he died, G. ii. 267, U. i. 23, and (b), except when instituted necessary heir by an insolvent, U. i. 14, (see *Necessarii heredes*), that he should



MANUMISSION—*continued.*III. MANUMISSION OF SLAVES BY TESTAMENT—*continued.*

be over thirty, G. ii, 276; if he was under thirty, or the testator only his bonitarian owner, direct testamentary manumission made him only a latin, U. i, 12, xxii, 8. A direct manumission took effect the moment that one of any number of heirs had entered, U. i, 22.

9. *Requisites in point of form.*—A testamentary manumission might be conditional, and while the condition was pendent the slave was termed *statuliber* (which see), U. ii, 1–6. It was useless if it stood in the testament (unless a military one, U. i, 20) anterior to the heir's institution, G. ii, 230, U. i, 20, or if placed between two institutions and both the heirs entered, U. i, 21; or if freedom was given as from the day before or the day after the heir's death, G. ii, 232, 233; or if it was given by way of penalty, 236.
10. *Indirect or fideicommissary manumission.*—See *Fideicommissum*, 12, 13.
11. *Restrictions of the Fufia-Caninian law.*—This enactment (see *L. Fuf. Can.*) limited, according to a sort of sliding scale, the number of his slaves a man could manumit by testament, the maximum being 100, however numerous his establishment, G. i, 42, 43, 45, ii, 228, U. i, 24. If he manumitted more than the lawful number, the enfranchisement was effectual only for those within the number who were mentioned first, G. i, 45a; therefore the statute required that they should be named, *ibid.*, ii, 239, U. i, 25; and any attempt to overreach the prohibition, as by writing the names in a circle, was rendered futile by certain senatusconsults, G. i, 46.
12. *Institution by an insolvent owner of one of his slaves as heres necessarius.*—See *Aelia-Sentrian law*, 5; *Necessarii heredes*.

IV. MANUMISSION OF PERSONS IN CAUSA MANCIPIL.—See *Mancipii etc.*, 3.

MANUS, a state of subjection of a woman to a man, either *matrimonii causa* or *fiduciae causa*, G. i, 108–115b, 137, 137a, U. tit. ix.

1. *Manus created confarreatione.*—*Confarreatio* was a sacrificial ceremony in the presence of ten witnesses, taking its name from the cake of *far* or spelt, U. tit. ix, note, which was employed in it, G. i, 112, U. tit. ix; (and there can be no doubt it was creative at once of both marriage and *manus*). It was still in use in the time of Gai. and Ulp.; for no one could fill the office of one of the greater flamens or of the *rex sacrorum* who was not the issue of

## MANUS—continued.

a farreate marriage, and himself married in that way, G. i, 112. But it had proved so difficult to induce women to submit to it that it had to be provided in the time of Augustus that, at least as regarded the *flaminica Dialis*, it should in future infer *conventio in manum* only in so far as the *sacra* were concerned, G. i, 136 and note, and therefore did not free her from her father's *potestas*, *ibid.*

2. *That created coemptione.*—*Coemptio* was a transaction *per aes et libram* (see *Aes et libra*, *Mancipatio*, 1), in which it rather appears that the parties—the man being called *coemptionator*, G. i, 115, 118, U. xi, 5, etc., and the woman *quae coemptionem facit*, G. i, 114, 115—each made pretence of purchasing the other, G. i, 113 and n. 2; but the formal words used by them, which were not the same as those used in an ordinary mancipation, G. i, 123, are not preserved. When it was *matrimonii causa* it probably was usually contemporaneous with marriage, yet quite distinct; for if a woman performed it with him who was already her husband, intending only fiduciary *manus*, yet by operation of law matrimonial *manus* was the result, G. i, 115*b*; while by marrying a man in whose *manus* she already was, she converted into matrimonial *manus* that which previously had been only fiduciary, G. ii, 139. A woman who was *sui juris* could not perform coemption without the *auctoritas* of her tutors, G. i, 115, 195*a*.
3. *That created usu.*—Here *manus* was superinduced on an already existing marriage, in which the parties had cohabited continuously for at least a year, G. i, 111; if the wife desired to avoid it, she had periodically to absent herself for at least three nights, *trinoctialis usurpatio*, and thus prevent the completion by her husband of twelve months' possession, *ibid.* By the time of Gai. it was obsolete, *ibid.*
4. *Effect of matrimonial manus on the position of the wife.*—In *manum conventio* by use being no longer observed, and that by *confarreatio* being limited to the *sacra*, the old consequences of it really survived only in that accomplished *coemptio*. For the wife it involved a *capitis deminutio*, G. i, 162, U. xi, 13, and was followed by its usual consequences (see *Cap. dem.*, 3); in particular, if she was a *filiafamilias* at the time, it put an end to her father's *potestas*, G. i, 136, and, whether *filiafamilias* or *sui juris*, placed her in the position of a daughter in relation to her husband, G. i, 115*b*, 136, ii, 139, or of a granddaughter in relation to her father-in-law if her husband

MANUS—*continued.*

was himself *in potestate*, G. i, 148, iii, 3. Whatever property she had became her husband's or father-in-law's, G. ii, 98; and by the civil extinction of her *persona* she was relieved of all her debts, G. iii, 84. As subject to a new family head she began, like other persons *alieni juris*, to acquire for him both property and claims, G. ii, 90, iii, 163, (see *Alieni juris personae*); but she could no longer oblige herself, G. iii, 104. Finally, as a *sua heres* of her husband, she was entitled to succeed to him *ab intestato* along with her children in his *potestas*, G. iii, 3, U. xxii, 14, and enjoyed generally the rights of *suae heredes*, (see *Sui heredes*).

5. *Its effect on the position of the husband.*—It created in his favour a universal acquisition of his wife's estate, G. ii, 98, iii, 83; with a few exceptions, everything of hers passed to him, and that without any civil liability for those of her debts that were not hereditary, 84. But if his wife's creditors got from the praetor *utiles actiones* (see *Actions*, 6), on the fiction of *caput integrum* (see *Fiction*, 3), and sued her on her personal debts, he was obliged to defend her, on pain of seeing the creditors allowed to sell what had been her estate, G. iii, 84, iv, 38, 80. His wife's subsequent acquisitions were all his, the only difficulty being as to whether she could acquire for him by possession and usucapion, G. ii, 90. The reason of the doubt was that she was not in his possession, *ibid.*, although she might be stolen from him, G. iii, 199. The *in manum conventio*, being *quasi agnatio suae heredis*, invalidated any testament made by him previously, G. ii, 139, U. xxiii, 3, (see *Agnatio sui heredis*); and in any subsequent one he was bound to institute or disinherit her, just as he had in the case of his children *in potestate*, (see *Testament*, 10), U. xxii, 14. He was entitled in his testament to appoint tutors both to his wife *in manu* and his daughter-in-law *in manu* of his *filiusfamilias* (see *Tutary*, 10), G. i, 148. Under certain circumstances the daughter-in-law might succeed as a *sua heres*, G. iii, 3.
6. *How matrimonial manus was dissolved.*—The relationship was dissolved by the death of the husband, the *capitis deminutio media* or *maxima* (see *Cap. dem.*, 1) of either of them, G. i, 137, or the remancipation of the wife, 118, 137a. This she could demand only when the marriage had been dissolved by divorce, 137a. The process was exactly the same as in the emancipation of a child, 118, 119, (see *Mancipatio*, 1). One of its consequences was that the person to whom she was mancipated, by manu-

MANUS—*continued.*

mitting her to make her *sui juris*, became her fiduciary tutor, G. i, 115, 166, 195*a*, U. xi, 5, (see *Tutory*, 3, 12, 21).

7. *Fiduciary coemptio*.—This was resorted to by women *sui juris* who wanted either to change their tutors, G. i, 115, 195*a*, or make a testament, 115*a*, or be relieved of the burden of the family *sacra* that had descended to them with an inheritance, 114, note 1. Its employment to enable them to make a testament was probably due to this,—that whereas they could not compel their *legitimi tutores* to concur, they bargained for concurrence with the fiduciary tutor of their own selection; but the device became unnecessary in consequence of a Sct. of Hadrian's, requiring tutors, other than patrons or parent manumitters, to grant their *auctoritas* to the testaments of their female wards, G. i, 115*a*, ii, 112, 122. Fiduciary coemption did not place a woman in the position of a daughter to her *coemptionator*, G. i, 136; and if it operated a transfer of her estate to him, he must have been required by the *pactum fiducie* to reconvey it to her on her manumission, otherwise she could not have disposed of it by testament, (see *Fiducia*).

MANUS INJECTIO, G. iv, 21–25; see *Legis actiones*, 5.

MARRIAGE, *nuptiae*, *matrimonium*, G. i, 56–64, U. tits. v, xiii. *Nuptiae* answered properly to marriage, in the sense of entry into the relationship of husband and wife, *matrimonium* being the state of matrimony, U. v, 2; although the words are sometimes used more loosely, as in the phrase *ex justis nuptiis concipere*, G. i, 90, 91.

1. *Matrimonium justum and non justum*.—The former is mentioned in G. i, 76, U. v, 1, 2, and *justae nuptiae* in G. i, 56, 90, 91; the latter in G. i, 87. The distinction was not that between lawful and prohibited marriage, but between one that fulfilled the requirements of the *jus civile*, so far as regarded the creation of *patria potestas*, and one that did not, G. i, 56, note 1. Only a Roman citizen could contract *justum matrimonium*, G. i, 56, U. v, 2, 4, and that only if he had *conubium* (which see) with the woman he married, *ibid.*; if he had no *conubium* with her, his marriage, though not prohibited, was *non justum*, as was that also in which the husband was a peregrin, irrespective of the consideration whether he had *conubium* with his wife or not, see *passim*, G. i, 65–81, 92.
2. *The provisions of the Julian law and subsequent senatusconsults in reference to marriage*.—They absolutely prohibited certain marriages between senators, or even com-



MARRIAGE—*continued.*

moners of free birth, and women of disreputable character, (see *Julian and Pap. Popp. law*, 3). Further, they required that all citizens within certain ages should marry, on pain of forfeiture of provisions left them by testament; taking care, however, that marriage between persons of disproportionate age should not relieve them, (see same reference, No. 4). But they did not otherwise interfere with the law of marriage or its conditions.

3. *Requisites of justae nuptiae.*—It was requisite that the man should be a citizen and have *conubium* with the woman he was marrying, see above, No. 1. Further, it was necessary that they should both have reached puberty, U. v, 2; that in addition to their own consent that of their *patres-familias* should have been given if they were *in potestate*, *ibid.*; and that there should be no impediment of too close propinquity or affinity, G. i, 58–63, U. v, 6. But, unless in marriage *confarreatione*, which was almost out of date (see *Manus*, 1), G. i, 112, 136, there is no suggestion that any ceremony was required.
4. *Propinquity and affinity as impediments.*—Marriage was unlawful between ascendants and descendants *in infinitum*, G. i, 59, U. v, 6; and even when the relationship had only been by adoption and had ceased, still the impediment remained, G. i, 59. Between collaterals of the second degree, *i.e.* brother and sister,—see the mode of computing propinquity in U. v, 6, note 2,—it was unlawful even though the relationship was only adoptive, G. i, 61; but on its dissolution the impediment disappeared, *ibid.* At one time the impediment reached the fourth collateral degree (cousins), U. v, 6; but in the time of Gai. and Ulp. a man might marry his brother's daughter, who was related to him in the third degree, yet not his sister's, G. i, 62 and notes, U. v, 6. Further, a man could not marry his father's or mother's sister, nor a woman who had been his mother-in-law, step-mother, daughter-in-law, or step-daughter, G. i, 63, U. v, 6.
5. *Effects of justae nuptiae.*—As regarded the parties, see *Husband and wife*; as regarded their children, see *Patria potestas*.
6. *Effects of incestuous marriages.*—*Incestae nuptiae* were those in which the parties were related within the forbidden degrees; the woman was not *uxor*, and the children were in law as fatherless as the issue of a casual connection, G. i, 64, U. v, 7.

MARRIAGE—*continued.*

7. *Effects of prohibited and unequal marriages.*—The marriage of a senator or man of free-birth with a woman of infamous character was a nullity, U. xiii, 1, 2. But an unequal marriage between a woman over fifty and a man under sixty was valid in itself, though of no avail as a qualification under the Julian law for taking an inheritance or a legacy, U. xvi, 4; and the *dos* became caducous, instead of following the ordinary rules, *ibid.*, (see *Dowry*, 8, *Caducity*, 6).
8. *Effect of matrimonium non justum.*—It was a perfectly valid marriage, though not productive of *patria potestas*; and if it was owing to some mistake on one side or other that it had failed to be *justum*, the defect might be cured by *erroris causae probatio* (which see), and *potestas* thus superinduced, G. i, 67–75. While it continued *non justum* however, the issue of it, being *sui juris*, did not possess the same rights in regard to their father's succession that were enjoyed by those born of *justae nuptiae*, G. ii, 241 and n. 2.

MARS, priests of, see *Flamines*; *Mars in Gallia*, U. xxii, 6.

MATER DEORUM SIPYLENSIS, U. xxii, 6.

MATERFAMILIAS, idea, U. iv, 1, note.

MATRIMONIUM, see *Marriage*.

MAURICIANUS, JUNIUS, a jurist of the time of Ant. Pius, U. xiii, 2 and n. 1.

MAXIMUS AND TUBERO, consuls A.D. 11, authors of a *Sct.* limiting the *manus* of the *Flaminica Dialis* to the *sacra*, G. i, 136 and note; see *Manus*, 1.

METUS EXCEPTIO, G. iv, 117, 121; see *Exception*, 9.

MILITIA.—Service for a certain period in the night watch was one of the ways in which a *latin* acquired citizenship, G. i, 32*b*, U. iii, 5; see *Junian latinity*, 7.

MINERVA ILIENSIS, U. xxii, 6.

MINORITY was the period between puberty and majority, *i.e.* from twelve and fourteen, for females and males respectively, to twenty-five, G. ii, 163, iv, 57. A minor was under comparatively few disabilities, and had this great advantage,—that he could obtain reinstatement by the praetor when he had entered into a transaction that was prejudicial to him, and whose consequences could not be otherwise avoided, (see *In integrum restitutio*), *ibid.* As regards curatory of minors, see *Curatory*, 3.

MINUS QUAM PERFECTA LEX, a law that imposed penalties on a contravener without annulling his act, U. i, 2.

MONEY was a *res nec Mancipi* (see *Res Mancipi*), G. ii, 81.

**MORA.**—If an heir was *in mora* in paying a *fideicommissum* or a legacy *sinendi modo* (see *Legacy*, 20), he was liable for interest and fruits and profits; but there was no such liability in the case of other legacies, G. ii, 280. If a wife died after divorce her heir was not entitled to claim the dowry unless the husband had been *in mora* in paying it to deceased, U. vi, 7.

**MORES**, see *Custom*.

**MORTIS CAUSA CAPIO**, G. ii, 225 and n. 2.

**MUCIUS, QUINTUS**, G. iii, 149; see *Scaevola*, Q. M.

**MULIER LIBERIS HONORATA**, see *Jus liberorum*.

**MUNICIPIUM**, a, could not be instituted heir in a testament except by one of its own freedmen, U. xxii, 5, neither could its members collectively, *ibid.*; but a trust imposed on an heir to make over an inheritance to them was lawful, *ibid.*, while a legacy might also be taken by them, U. xxiv, 28. Emphyteutic grants of lands by a municipality are referred to in G. iii, 145.

**MUTE**, a, could not be a party to a stipulation, G. iii, 105, nor validly execute a testament *per aes et libram*, U. xx, 13, nor assist in the execution of another person's as *familiae emptor*, witness, or balance-holder, U. xx, 7. If he happened to be tutor-at-law of a woman, she was entitled to have a substitute to constitute a dowry for her, G. i, 180, U. xi, 21.

**MUTUUM**, loan for consumption, G. iii, 90; see also *Real obligations*.

1. **Mutuum, what?**—It was a real contract,—loan of fungibles, *i.e.* things passing by weight, number, or measure, which were transferred in property to the borrower, under an obligation to return others of the same sort, G. iii, 90. It is said to have derived its name from the fact that *ex meo tuum fit*, *ibid.*; consequently it was not held to have been contracted when there was incapacity for alienating, and therefore no transfer of property, G. ii, 80–82.
2. **Loan by a woman or pupil without tutorial auctoritas.**—Money being a *res nec Mancipi*, G. ii, 81, and a woman capable of alienating things of that class without her tutor's *auctoritas* (see *Women*, 4), 80, she could quite well be a lender, 81. But a pupil had not that power of alienation, 80; therefore when he lent money without his tutor's *auctoritas*, he did not make it the property of the borrower, and so there was no *mutuum*, 82. So long as it was still extant, being still his, he might recover it by a *rei vindicatio*, *ibid.*: if consumed, he recovered it by a *condictio* (which see), *ibid.*; not, however, on the ground

MUTUUM—*continued*.

of *mutuum*, but rather because it had been consumed *sine causa*, *ibid.*, note 4.

3. *Action to which it gave rise*.—Repayment was sought in a *condictio certi*, on an *intentio*—*si paret reum dare oportere*, (see *Intentio*, 2), G. iii, 91.

NATURAL CHILDREN, different meanings of phrase, G. i, 19, note 2.

NATURAL OBLIGATIONS, G. iii, 119*a* and n. 1; see *Obligation*, 5.

NATURALIS RATIO, G. i, 1, 89, 189; ii, 66, 69, 79; iii, 154*a* and note. See also *Jus naturale*.

NAVIS FABRICATIO was one of the ways in which a latin could become a citizen, G. i, 32*c*, U. iii, 6; see *Junian latinity*, 7.

NECESSARI HEREDES were heirs who became such by necessity of law, and whether they would or not, G. ii, 153, 157, iii, 87; and they were either *sui et necessarii* (see *Sui heredes*), who had by grace of the praetors *potestas abstinendi*, G. ii, 158, U. xxii, 24, or simply *necessarii*, who usually had no power of abstaining, G. ii, 152. The simple *heres necessarius* was a slave of a testator's instituted heir with freedom, G. ii, 153. Such an institution—often in the shape of a final substitution (which see, No. 1)—was largely resorted to by insolvents, who desired to avoid being made bankrupts after their death; by instituting or substituting a slave as *heres necessarius* it was the latter that was made a bankrupt, and to whom the consequent disgrace attached, (see *Bankruptcy*), G. ii, 154. To such institutions the restrictions of the Aelia-Sentian law as to age and previous character of the slave (see *Aelia-Sentian law*, 3, 4) did not apply; his heirship and freedom made him a citizen, U. i, 14. A person *in causa mancipii* (see *Mancipii etc.*) who was instituted heir with freedom was also a *heres necessarius*, but had *potestas abstinendi* like a *suus*, G. ii, 160. In presence of a necessary heir there could be no *usucapio pro herede*, (see *Usucapion*, 6), G. ii, 58, iii, 201.

NEFASTUS DIES, a *legis actio* could not proceed upon, G. iv, 29.

NERVA, M. COCCEIUS, grandfather of the emperor of the same name, consul A.D. 22, a disciple of Labeo's, and head of his school after his death, G. i, 196, note 1, ii, 15, 195, iii, 133.

NEXI SOLUTIO was a mode of discharging an obligation without actual payment, G. iii, 173, (although originally it may have been the formal discharge that accompanied or followed payment). It was employed when the debt to be discharged had been created *per aes et libram* (which see),



NEXI SOLUTIO—*continued*.

or by a judgment, or by damnatory words in a testament (see *Damnatus esto*) ; but was possible only when what was due could be weighed or counted, and was of definite amount, 173, 175. The ceremony was itself *per aes et libram* ; the procedure and the words of style are in 174, 175 and n. 3.

NEXUM, a mode of contracting *per aes et libram*, G. iii, 89, note, which seems almost to have gone out of use before the time of Gai. It would rather appear that a man could oblige himself *per aes et libram* (which see) only for what could be weighed or counted, (*i.e.* money, G. i, 122), and was of definite amount, G. iii, 175. It might be discharged by the corresponding ceremony of *nexi solutio*, without actual payment, 173.

NOMINA ARCARIA, G. iii, 131 ; see *Literal obligations*, 2.

NOMINA TRANSCRIPTICIA, G. iii, 128 ; see *Literal obligations*, 1.

NOMINIS DIES (or *dies lustricus*), a child's name-day, survivance of which augmented its parents' powers in taking one under the testament of the other, U. xv, 2 and n. 1, xvi, 1a.

NON NUMERATAE PECUNIAE, EXCEPTIO, G. iv, 116 ; see *Exception*, 9.

NOSTRI PRAECEPTORES, a phrase used by Gai. to indicate the Sabinians, to whose school he belonged ; see *Sabinians and Proculians*.

NOVATION, G. iii, 176, 179 ; see also *Obligation*, 3.

1. *Novation, what ?*—It was a mode of extinguishing an obligation by transmuting it into a new one, G. iii, 176 ; and might be employed even when the obligation novated was only a natural one (see *Obligation*, 5), G. iii, 119a, note 1. It was effected either by substitution of a new debtor or creditor without changing the nature of the obligation, or by substituting a new obligation without change of debtor or creditor, G. ii, 38, 39, iii, 176, 177.
2. *Novation by substitution of a new debtor*.—In such a case the novation put an end to the old obligation even when the new one was inoperative, G. iii, 176, unless the inoperativeness was due to the fact that the new debtor was a slave, *ibid.*, or a peregrin who had used the word *spondeo* (see *Stipulation*, 2), *ibid.*
3. *Novation by substitution of a new creditor*.—If the original creditor authorised a third party to take from the debtor a stipulatory engagement for the same debt—a transaction which was called delegation of his debtor by the creditor to the third party, G. iii, 130—the debtor was thereby discharged so far as the original creditor was concerned, and became bound to the new one, G. ii, 38, 39.
4. *Novation by substitution of a new obligation*.—The substituted

NOVATION—*continued*.

obligation was held to be new if anything, such as a condition, a time of payment, or a surety, was superinduced on or withdrawn from the original one, G. iii, 177; Proculus, however, denying that introduction or withdrawal of a surety had that effect, 178. When it was a condition that was introduced, the question of novation was in suspense until its fulfilment; for if it failed, the original obligation was recognised, though not unanimously, as still subsisting, 179. Even in such a case, however, it was maintained that action on the latter might be resisted by an *exceptio doli* (see *Exception*, 8), as contrary to the intent of parties, *ibid*.

5. *Novation in nomina transscripticia*.—See *Literal obligations*, 1.

6. *Processual novation*.—See *Litis contestatio*.

NOXAL ACTIONS, G. iv, 75–78, 81, were those against *paterfamilias* in respect of delicts of their *filiofamilias* committed against strangers, or owners in respect of delicts committed by their slaves, and in which defender, if condemned, had either to pay damages or surrender the wrong-doer to the party injured, 75; some of them being authorised by statute, others by the praetor's edict, 76. As the liability always followed the delinquent, 77, if a *filiofamilias* guilty of delict became *sui juris* before action was raised, the action ceased to be noxal, and became a direct one against himself, *ibid*.; while if a slave changed hands after the delict, the noxal action lay against his new owner, *ibid*. If, however, the delict was against the *paterfamilias* or slave's owner, as there was no action competent at the moment, so none became competent by transfer of either to another person's *potestas*, or even by his becoming *sui juris*, 78; but whether a right of action competent in respect of a slave's delict was extinguished by the slave's falling into the *potestas* of the injured party, or only suspended till he again passed out of it, was matter of controversy, *ibid*.

NOXAL MANCIPIUM, see *Mancipii etc.*, 3.

NUDUM JUS QUIRITIUM, see *Quiritarian ownership*.

NUNCUPATIO, as an accompaniment of transactions *per aes et libram*, G. ii, 104, note 8.

NUNCUPATIO TESTAMENTI, see *Testament*, 4.

NURUS.—A daughter-in-law *in manu* of a *filiofamilias* was *in potestate* of her father-in-law in the character of a granddaughter, G. i, 148, ii, 159; and she and her children succeeded him as *sui heredes* if her husband had predeceased, G. iii, 3, U. xxii, 14.

OBLATUM FURTUM, see *Theft*, 4, 5.

OBLIGATION, G. iii, 88-225.

I. OBLIGATION GENERALLY.

1. *Obligation what?*—The word is not defined in the texts, but the idea left to be gathered from the detailed exposition. But it was used sometimes to denote the relation or bond between a creditor and his debtor, G. iii, 124, 176, iv, 78, etc.; sometimes the claim or hold the former had against or over the latter, G. ii, 14, 38, etc.; sometimes the duty the latter owed the former, G. i, 192, iii, 119, etc.
2. *How it arose*.—A civil obligation, *i.e.* one upon which a creditor could sue his debtor, arose either from contract or delict, the first dealt with in G. iii, 89-162, the second in 163-225, (see *Contract, Delict*); sometimes it arose without either contract or delict, from facts and circumstances, 89, note 1, 91. An agreement, *pactum conventum*, was not necessarily a contract; and those pacts which the law did not recognise as contracts, though they might be binding naturally, and could be pleaded by way of exception to the effect of defeating an action on a contract, G. iv, 116*a*, yet did not engender civil obligation.
3. *How extinguished*.—(a) By payment of what was due, no matter how the obligation had arisen, G. iii, 168; see *Payment*. (b) By novation, also in any case, 176-179; see *Novation*. (c) By acceptilation when the obligation had been created by verbal contract, 169-172; see *Acceptilation*. (d) By written *accepti latio* when the debt had been created by *expensi latio*, G. iii, 129, 130; see *Literal obligations*, 1. (e) *Per aes et libram* when the debt had been so created, or was upon a judgment or upon a legacy *per damnationem*, 173-175; see *Nexi solutio*. (f) By litiscontestation in a *judicium legitimum*, 180, 181, and notes; see *Litis contestatio*. (g) By *capitis deminutio*, though equity gave a remedy, G. iii, 84, iv, 38, 80; see *Cap. deminutio*, 3, 4. (h) Claims against hereditary debtors were extinguished by *in jure cessio* of an inheritance after entry, G. ii, 35, iii, 85; see *Hereditas*, 15, 16.
4. *Impossibility of its transfer*.—Though an obligation was a *res incorporalis*, G. ii, 14, yet, unlike other incorporeals, it was incapable of cession or transfer in any way whatever, G. ii, 38; for though a new creditor or a new debtor might be put in place of the original one, that was done by novation (which see), which was very different from transfer, *ibid.* Without, however, transferring the obligation, a creditor could give a third party the beneficial interest in it by authorising him to sue upon it as his,

OBLIGATION—*continued.*I. OBLIGATION GENERALLY—*continued.*

the creditor's, cognitor or procurator, (see *Formula*, 2, *Procuratory in litigation*, 4), G. ii, 39, 252.

5. *Natural obligations in particular.*—Natural obligations were not recognised by law to the extent of its allowing action upon them, see above, No. 2. The only point noticed by Gai. in reference to them is, that they might be guaranteed by sureties, as in the case of an obligation by a slave, G. iii, 119a; but in note 1 to that par. there is an enumeration of other results that followed them as *vincula acqutatis*.

6. *Other varieties.*—They were unilateral or bilateral; unilateral in the verbal and literal contracts; bilateral (or mutual) in the consensual ones, G. iii, 137. In alternative ones the election was with the debtor unless otherwise expressed, G. iv, 53; and in generic ones, *obl. generis*, the rule was the same, *ibid.* Of some obligations performance was to be due from time to time, as in the case of annuities or other periodical payments; the obligation, however, was one and the same; and in suing for what had fallen due, on a *quidquid dare oportet* (see *Intentio*, 2), a creditor ran the risk of *consumptio actionis* (which see), unless he prefixed a limiting prescription to his *formula* (see *Praescriptio*), G. iv, 131, 131a.

## II. THE PARTIES TO AN OBLIGATION.

7. *Obligation between a paterfamilias and his dependants.*—There could be no civil obligation between a man and a person subject to his *jus*, G. iv, 78; and a *filiusfamilias* or slave did not become liable to action merely by afterwards becoming *sui juris*, *ibid.* But the law did recognise the possibility of natural obligation between them; as when it authorised a *paterfamilias*, sued in an *actio de peculio* (see *Adjectician actions*, 3), to deduct from the *peculium* whatever was due him by his *filiusfamilias* or slave before settling with the pursuer, G. iv, 73.
8. *Acquisition of claim through third parties.*—It was impossible for a man to acquire a claim through the contract of a stranger, whether a freeman or a *servus alienus*, G. ii, 95, even though such stranger was acting as his procurator or agent (see *Procurator*), *ibid.* But he might acquire *ex contractu* through a person in his *potestas*, *manus*, or *mancipium*, G. iii, 163; through a person, whether free or slave, *bona fide* possessed by him as his slave, if the claim was acquired by means of the possessor's funds or the supposed slave's labour, 164; or



OBLIGATION—*continued*.II. THE PARTIES TO AN OBLIGATION—*continued*.

through a usufructed slave under the same qualifications, 165. If a slave was in the bonitarian ownership (which see) of one man and the quiritarian ownership of another, a claim acquired by him always accrued to the former, unless (?) expressly declared to be for the latter, 166. One owned by two persons jointly acquired for them *pro rata*, unless one in particular was named in the contract, 167; there being a difference of opinion as to whether the rule was displaced when the slave had acted on the instructions of one only, 167*a*.

9. *Liability through acts of third parties*.—For the contract debts of a stranger, whether a freeman or a *servus alienus*, a man was liable only when he had placed him in charge of a ship or store, and the debt had been contracted on account thereof; in such cases he was responsible in an exercitorian or institorian action, as the case might be, G. iv, 71, (see those words). As regards the liability of a *paterfamilias* for the debts *ex contractu* or *ex delicto* of those in his *jus*, see G. iv, 70–78, and respectively *Adjectician actions* and *Noxal actions*.
10. *Liability of persons alieni juris*.—A *filiusfamilias* was the only person *alieni juris* that could civilly oblige himself; all others were incapable of doing so, G. iii, 104, though they might be obliged naturally, (see above, Nos. 5, 7).
11. *Rights and liabilities of heirs*.—Heirs might sue or be sued *ex contractu*, with two or three exceptions; they might sue *ex delicto*, except the *a. injuriarum*; but they were not liable for the penalties of their predecessor's delict, G. iv, 112, 113, (see *Actions*, 7, *Hereditas*, 14). It was a rule of law that an obligation could not begin in the person of the heir either of debtor or creditor, G. iii, 100, 158; a stipulation therefore for a payment after the death of stipulant or promiser was useless, 100; so was a commission to a man to do something after the death of either mandant or mandatory, 158; and 'the day before death' was in the same position, as its arrival and the commencement of the obligation could not be known until after death, 100. The reason was, that though a man's heir represented him, and therefore was entitled to enforce his claims and responsible for his engagements, G. ii, 98, yet his heir's heir did not represent him. Therefore a testator could not charge his heir's heir with a legacy, G. ii, 232, U. xxiv, 16. He might, however, impose on his heir's heir the burden of performing an

OBLIGATION—*continued*.II. THE PARTIES TO AN OBLIGATION—*continued*.

obligation which commenced in the person of the heir while drawing his last breath, G. ii, 232, 278, iii, 100 ; this was practically imposing the obligation itself on the heir's heir ; and so in *fideicommissa*, which were not tram-melled by the rules of the *jus civile*, (see *Fideicommissum*, 1), no difficulty was made in admitting the validity of an express direction to the heir's heirs to denude after his death in favour of a third party, G. ii, 277, U. xxv, 8.

12. *Obligations of pupils and women in tutelage*.—See *Pupils, Women*, 4.

OBROGATIO LEGIS, alteration of some of the provisions of a statute, U. i, 3.

OCCUPATIO, appropriation of a *res nullius*, see *Property*, 4.

OFILIUS, AULUS, a jurist of distinction much trusted by Julius Cæsar, and supposed to have been his adviser in his contemplated Code, G. iii, 140 and n. 2.

OPE EXCEPTIONIS, see *Ipso jure*.

OPTIO TUTORIS, see *Tutory*, 10.

OPTIONIS LEGATUM, U. xxiv, 14 ; see *Legacy*, 8.

ORBI, married persons who were childless, were not allowed by the Papian law to take more than a half of what was left them in a testament, G. ii, 286*a*, (see *Julian and Pap. Popp. law*, 6). The prohibition did not extend, however, to military testaments, G. ii, 111 and n. 4.

ORDO and GRADUS in succession, distinction, G. iii, 27, note 1.

OUTLAYS, see *Impensæ*.

OWNERSHIP, see *Property, Quiritarian ownership, Bonitarian ownership*.

PACTI CONVENTI EXCEPTIO, G. iv, 116*a*, 121, 122.

PARENT AND CHILD, their jural relation to each other ; see also *Marriage, Status*.

1. *Where the child was the issue of justum matrimonium*.—For the nature of *justum matrimonium* see *Marriage*, 1. Where it had been contracted, a child born of it was a citizen like his father, G. i, 56, 67 ; and if the latter was *sui juris* at the time of conception—for it was that moment that determined the status of legitimate children, G. i, 89, U. v, 10—the child was in his *potestas*, G. i, 55, (see *Patria potestas*). If his father was *sui juris*, then the child, so long as he remained in *potestate*, was one of the family *sui heredes*, G. ii, 156, iii, 2, U. xxii, 14, and in a manner joint-owner with the father of the family estate, G. ii, 157 ; the latter, therefore, if he made a tes-

PARENT AND CHILD—*continued*.

tament, required either to institute or disinherit him, G. ii, 123 f., U. xxii, 14, (see *Testament*, 10); and on intestacy he had the first right to the succession, G. iii, 1, U. xxvi, 1, (see *Intestate succession*, 3). As regards the parent's rights over the child,—and the parent in this case might be in fact a grandfather or even remoter ascendant, G. i, 146,—see *Patria potestas*, 3; and as regards the child's capacities and incapacities, see *Alieni juris personae*, 2-4. A child born in *justo matrimonio* within ten months after the husband's death counted as his, U. xvi, 1a. The existence of children of a marriage conferred important rights upon the parents in reference to succession, the dowry, release from tutory, acquisition of citizenship, etc., some of them arising whether there had been a marriage or not, see *Jus liberorum*, *Husband and wife*, 7, *Dowry*, 4, 6, *Julian and Pap. Popp. law*, 2, 5, 6, 7.

2. *Where issue of non justum matrimonium*.—When a marriage was *non justum* (see *Marriage*, 1) a child born of it was not on that account a bastard; though by the *jus gentium* he took his mother's status, G. i, 80, U. v, 8,—a rule (see *Status*, 2) that was occasionally altered by positive legislation,—he was still *justus filius patris*, G. i, 77, at least when his father was a peregrin. But he was not in his father's *potestas*, G. i, 87, for that resulted only from *justae nuptiae*, G. i, 55; consequently, suppose the father was a citizen and could make a testament, the child had no claims upon him in respect of it, being in law a stranger, *extraneus*, G. ii, 241 and n. 2.
3. *When issue of an incestuous or unlawful connection*.—The child was then accounted spurious, just as if *vulgo conceptus*, G. i, 64, U. v, 7; see below, No. 5.
4. *When issue of concubinage*.—There is no reference to concubinage in Gai. or Ulp.; but the issue of it were called *naturales*, not *spurii* or *vulgo concepti*, G. i, 64, note 3, and in the later law had certain rights in reference to their father's succession.
5. *When issue of a casual connection*.—Children of this sort were the *spurii* or *vulgo concepti* properly so called, with whom incestuous offspring were classed; they were regarded as in law fatherless, G. i, 64, U. iv, 2; and took their status from their mother as their only known parent, *ibid.*, dating it, not from the time of conception as in the case of legitimate children, but from that of birth, G. i, 89, U. v, 10. As fatherless they were of course *sui juris*, U. iv, 2.

PARTITIO LEGATA, G. ii, 254, U. xxiv, 25 ; see *Legacy*, 8.

PARTNERSHIP, *societas*, G. iii, 148-154a ; see also *Consensual obligations*.

1. *Societas, what ?*—It was a consensual contract, G. iii, 135, in which two or more persons agreed, as *socii*, to have a common interest either in the whole means and estate of each or in some particular trade or business, 148 ; each contributing something to the common stock, either in money or kind, or in personal services, 149.
2. *Distribution of profit and loss*.—After some hesitation it was held not to be inconsistent with the nature of the contract that a partner should share in the profits yet bear none of the loss, if the importance of his personal services or other circumstances rendered such an arrangement reasonable, G. iii, 149. In the absence of special agreement, the rule was that the partners were entitled to equal shares of the profits and bound for equal shares of the loss, 150 ; and when there was an agreement, but it was specific as to the division of one only of those incidents, the law assumed it the intention of parties that the other should be shared in the same proportion, *ibid*.
3. *Dissolution of a partnership*.—It came to an end when the mutual consent upon which it was founded, G. iii, 154a, was at end, 151 ; though fraudulent renunciation by one of the partners, in order to deprive his *socii* of some imminent profit, was not allowed thus to prejudice them, *ibid*. It was dissolved also by death, *capitis diminutio minima*, confiscation, or bankruptcy ; though, in any of the three latter cases, (which were all *civiles rationes* for the dissolution of a *juris gentium* relationship), if the parties desired nevertheless to go on as before, a new partnership was held to have commenced, 152-154a.
4. *Actions appropriate to the relationship*.—When there was an allegation that a partner had not fulfilled his obligations under the contract, the remedy was an *actio pro socio* ; it was *bonae fidei*, G. iv, 62 ; but condemnation in it rendered the defender infamous, G. iv, 182. When all that was wanted was division of common property, an *a. communi dividundo* (which see) was resorted to, G. iv, 42.

PATERFAMILIAS, *idea*, U. iv, 1, note ; for his position, rights, and duties, see *Patria potestas*, 1-4.

PATRIA POTESTAS, G. i, 55-107, 127-137a ; U. v, vii, 4, viii.

#### I. NATURE OF THE PATRIA POTESTAS.

1. *Its nature generally*.—The *patria potestas* was the right, *jus*, exercised by a *paterfamilias* over the *fili*i and *filiæ fami-*  
*lias*. It was an institution of the *jus civile* and peculiar



PATRIA POTESTAS—*continued.*I. NATURE OF THE PATRIA POTESTAS—*continued.*

to citizens, G. i, 55, 189; although something closely resembling it was sometimes found amongst peregrins, 55, and existed in Rome's latin *municipia*, *ibid.*, note 2. At the same time the law did not recognise its *de jure* possibility amongst any but citizens, and denied it in particular to Junian latins, G. i, 66, and deditician freedmen, 68. It was only a *paterfamilias* that could have it, —a woman could not, G. i, 104, ii, 161, U. viii, 8a. And it created such a community of interests between the head of the house and his subject descendants that they were in a manner joint-owners with him of the family estate, G. ii, 157; that civil obligation between them was impossible, G. iv, 78, although there might be a natural one (see *Obligation*, 5), G. iv, 73; and that they were, in some cases at least, incompetent witnesses of each other's formal deeds, G. ii, 105–108, U. xx, 3–6.

2. *Over whom it extended.*—That a man was a citizen did not necessarily give him *potestas* over his children; for if they were the issue of a marriage without *conubium* there was no *potestas*, G. i, 56, unless something supervened to create it, (see below, Nos. 11, 12); while if they were the issue of an incestuous, prohibited, or casual connection, they were not even regarded as his children, (see *Marriage*, 6, 7, *Parent and child*, 5). When the *potestas* existed it did not end with sons and daughters, but included also grandchildren through a son, *nepotes neptesque ex filio*, great-grandchildren through a grandson who was issue of a son, *pronepotes proneptesque ex nepote filio nato prognati prognataeque*, and even remoter descendants tracing their descent through males, if such existed, G. iii, 2; but it did not include descendants through females, for a child followed his father's, not his mother's family, G. iii, 71. A woman, however, might enter her husband's family by *in manum conventio*; and in such a case, if he was *in potestate* of his father, so was she, but in the character of a granddaughter, G. i, 148, ii, 159, iii, 3, (see *Manus*, 4).

3. *Rights it conferred on the paterfamilias.*—It entitled him to emancipate his *filiusfamilias* and thus deprive the latter of the advantages of the relationship, G. i, 132 f., (see *Emancipation*, 2); to give him in adoption, G. i, 134, (see *Adoption*, 1, 3, 7); or to disinherit him, G. ii, 123, (see *Testament*, 10). He might, by withholding his consent, prevent him contracting *justum matrimonium*, U. v, 2,

PATRIA POTESTAS—*continued.*I. NATURE OF THE PATRIA POTESTAS—*continued.*

(see *Marriage*, 3); he might by testament appoint a tutor for him if on the death of the *paterfamilias* he was to become *sui juris*, G. i, 144–146, (see *Tutory*, 1, 10); he might, by way of pupillary substitution, even make a will for him to take effect in the event of his dying while still a pupil, G. ii, 179, 180, U. xxiii, 7, 8, (see *Substitution*, 2). Lastly, he was entitled to all the acquisitions of his *filiusfamilias*, whether in the shape of property, G. ii, 87, or claims by contract, G. iii, 163.

4. *Responsibilities it imposed upon him.*—By praetorian law he was responsible to a certain extent for the debts *ex contractu* of his *filiusfamilias*, G. iv, 69–74a, (see *Adjectician actions*); and, partly by the *jus civile*, partly by the edict, he was noxally responsible for his delicts, 75–79, (see *Noxal actions*). And as regarded a *filiusfamilias* who was to become *sui juris* on his death, he was bound, if he made a testament, either to institute or disinherit him; he could not, by leaving him unmentioned, deprive him of his birthright interest in the family estate, G. ii, 123 f., (see *Testament*, 10).
5. *Incapacities to which it subjected the filiusfamilias.*—See *Alieni juris personae*, 2–4.
6. *Rights to which it entitled him.*—If he was an immediate descendant of his *paterfamilias*, he was entitled to disregard any testament made by the latter in which he had been passed over, G. ii, 123, (see *Testament*, 10); while a *filiafamilias*, or a *filiusfamilias* who was only a grandson but whose own father was dead, was entitled if unmentioned either to share with the institute by accretion under the *jus civile*, G. ii, 124, 126, (see *Adcretio*, 3), or to challenge the testament and obtain *bonorum possessio* under the edict, G. ii, 125, (see *Bonor. poss.*, 6). If the *paterfamilias* died intestate those of his *fili*i and *filiae familias* who became *sui juris* had by the *jus civile* the first place in his succession, G. iii, 2, (see *Intestate succession*, 3); although by the edict emancipated children were admitted along with them, G. iii, 26, (see *Bonor. poss.*, 14).

## II. HOW IT WAS CREATED.

7. *By justae nuptiae.*—See *Marriage*, 1, 3.
8. *By adoption and adrogation.*—See *Adoption*.
9. *By jus Latii.*—This was a mode by which a colonial latin acquired citizenship, and, in certain cases, not only for himself but for his children, G. i, 96. It is not said,

PATRIA POTESTAS—*continued.*II. HOW IT WAS CREATED—*continued.*

however, that *potestas* accompanied it, and judging by the rule in reference to *potestas* following citizenship by imperial grant (below, No. 12), it is possible that it did not; see *Colonial latinity*, 2.

10. *By causae probatio ex lege Aelia Sentia.*—This applied to Junian latins; the moment cause was proved *potestas* was created as well as citizenship, G. i, 66, U. vii, 4; see *Caus. prob. ex l. Ael. Sent.*
11. *By erroris causae probatio.*—See *Error. caus. prob.*
12. *By imperial grant.*—It is not distinctly stated that the *patria potestas* was ever granted *per se*. But it was a frequent accompaniment of a grant of citizenship to a man and his children; not, however, as a matter of course, but only when it had been expressly asked for and expressly granted, G. i, 93, 94, ii, 135*a*, iii, 20; a careful inquiry being always instituted as to whether it was for the advantage of the children, hitherto *sui juris*, to make them *alieni juris*, G. i, 93.

## III. HOW IT WAS PUT AN END TO.

13. *Death of the paterfamilias.*—This absolutely relieved from the *potestas* a son or daughter, or a grandchild whose immediate parent was dead or emancipated, because they became *sui juris* by the event, G. i, 127, U. x, 2; but as regarded those whose immediate parent was alive and *in potestate*, they were not relieved, but simply passed from the *potestas* of a remoter into that of a nearer ascendant, *ibid.*
14. *Emancipation.*—See *Emancipation*, 1.
15. *Adoption and adrogation.*—If the *paterfamilias* gave his child in adoption, the latter passed out of one *potestas* into another, G. i, 99, U. viii, 1, 3; while the same result followed if the *paterfamilias* gave himself in adrogation, for his adoption carried with it that of his children *in potestate*, G. i, 107, U. viii, 8, (see *Adoption*, 2, 3).
16. *The greater capitis deminutiones.*—Emancipation, adoption, and adrogation all involved *cap. deminutio minima*; the *potestas*, as a right competent only to a citizen over a citizen, was necessarily ended when either *paterfamilias* or *filiusfamilias* underwent one of the greater *minutiones* by losing freedom or citizenship, G. i, 128, 131, 160, U. x, 3, xi, 11, 12, (see *Cap. deminutio*, 1). But where either was taken captive by an enemy, the *potestas* was only suspended, and revived if he returned, G. i, 129, U. x, 4, (see *Captivity apud hostes*).

PATRIA POTESTAS—*continued.*III. HOW IT WAS PUT AN END TO—*continued.*

17. *Other ways.*—A *filiusfamilias* became *sui juris* without *capitis deminutio* when consecrated a priest of Jupiter, and a *filiafamilias* when chosen as a Vestal virgin, G. i, 130, iii, 114, U. x, 5. Lastly, a woman was released from the *potestas* of her father on passing *in manum mariti* by coemption, G. i, 136; but by the later law this result did not follow *manus* created *confarreatione*, *ibid.*; still less did it follow marriage without *manus*, U. vi, 6, (see *Manus*, 1, 2, 4, *Husband and Wife*, 3).

PATRONATE was the relationship that existed between a freedman, *libertus*, and his *patronus*, *i.e.* the person or the representatives of the person to whom he belonged before manumission.

1. *Who were patrons.*—In the case of a freedman who became a citizen on manumission—and to become so he required to have been manumitted by his quiritarian owner, G. i, 17, U. i, 16, (see *Manumission*, 2)—the patronage, with its attendant rights, belonged in all cases to his manumitter, and passed on the latter's death to his male descendants, even though not his heirs but disinherited in his testament, G. i, 165, iii, 48, 58. When the freedman became only a latin on manumission, the patronage, so far as its rights were concerned, might be split, the tutory of the freedman going to his quiritarian owner at the time of manumission and the latter's male descendants as above, G. i, 167, U. xi, 19, but his estate going on his death, if he died a latin, to his manumitter and his heirs, whether that manumitter had been his quiritarian or merely his bonitarian owner, G. iii, 58. The patronage might be in a patroness instead of a patron, though she, because of her sex, was unable to exercise some of its rights, *e.g.* tutory, G. i, 195; while others, *e.g.* succession, were in her case more restricted than in that of patrons, G. iii, 49, 52. A municipality or other *universitas* might be patron of its freedmen, U. xxii, 5; but obviously with rights considerably restricted.
2. *The patron's rights.*—A patron and his male descendants were entitled to the tutory of his freedmen under puberty and freedwomen of any age, for they had no agnates to claim it (see *Agnation*, 1) as in the case of persons of free birth; see *Tutory*, 18, 19. He and they were entitled to the succession, or a share of it, of a citizen freedman dying without children of his own, (see *Succession to citizen freedmen*); and he and his children



PATRONATE—*continued.*

not expressly disinherited, and failing them his stranger-heirs, took the estate of a latin freedman, (see *Succession to Junian latins*). If his freedman was withheld from him, the patron had an exhibitory interdict (see *Interdicts*, No. 2) for his production, G. iv, 162; and his eventual interest in his freedman's estate entitled him under the Aelia-Sentian law to ignore any manumission by him by which he was defrauded, G. i, 37.

3. *The freedman's obligations.*—A freedman, if a citizen, and therefore qualified to make a testament, was bound to pay due regard in it to the rights of his patron; see *Succession to cit. freedmen*. He owed his patron so much respect that he was forbidden to summon him in a litigation without leave of the praetor, and if he did was liable in damages, G. iv, 46. Finally, he was bound to render his patron certain services, some of which it was the custom to promise under oath, G. iii, 96a; it was peculiar to these last that the patron ceased to be entitled to them on his *capitis deminutio*, G. iii, 83.

4. *How the relationship was ended.*—It is not said that the relationship came to an end by *capitis deminutio minima*; but as the patron's right of tutory and of succession *ab intestato* were *legitima jura*, they necessarily were extinguished by *cap. dem.* of either party, and the patronage thus shorn, so far as the *jus civile* was concerned, of some of its most important prerogatives, G. iii, 51, 83, U. xi, 9. Acquisition of citizenship by a Junian latin (see *Junian latinity*, 7) did not dissolve the relationship, but only change the nature of it, (above, No. 1). Yet not necessarily; for an imperial grant might be *salvo jure patroni*, G. iii, 72, which reserved to the patron the same rights of succession as if his freedman had remained a latin; and if given without such reservation, but without the patron's consent or knowledge, the result was the same, unless the citizen-latin subsequently confirmed his citizenship by *causae probatio* under the Aelia-Sentian law or the Sct., (see *Ael.-Sentian law*, 6, 7), G. iii, 73.

PAYMENT (including therein other varieties of performance), *solutio*, the commonest mode of extinguishing an obligation, G. iii, 168; partial payment, where that was possible, amounting to partial extinction, 172.

1. *Was it payment when something else was given than what was due?*—Not unless with the creditor's consent; and even then it was a point of controversy between the schools whether the debtor was *ipso jure* discharged or only in a

PAYMENT—*continued.*

position to meet any further claim by his creditor with an *exceptio doli*, G. iii, 168.

2. *Did payment of the true debt always imply discharge?*—It did not if it was to another party than the creditor or his representative, G. iii, 160, although excusable error sometimes introduced an exception to the rule, *ibid.* Neither did it if it was to a pupil without his tutor's *auctoritas* (see *Pupils*), G. ii, 83, 84; the money paid became the pupil's property, but the debtor was not thereby freed; for to grant a discharge, either directly or by implication, was to part with an item of his estate, which it was not in the power of a pupil to do without his tutor's concurrence, *ibid.* This was the *ipso jure* state of matters; but if the pupil was the richer for the payment, and nevertheless claimed it a second time, he might be defeated by an *exceptio doli mali*, (see *Exception*, 8), G. ii, 84. A woman, however, effectually discharged her debtor by accepting actual payment from him, G. ii, 85, iii, 171; because she was entitled to alienate her *res nec Mancipi*, amongst which obligatory claims were included, without her tutor's *auctoritas*, G. ii, 80, 85, (see *Women*, 4). Payment to an adstipulator (see *Adstipulation*) was as effectual as to the principal stipulant, G. iii, 111.

PECULIUM was a fund which a *paterfamilias* entrusted to a *filius-familias* or slave, and of which, though *de jure* it still belonged to the granter, they had had the administration while they continued to possess it, G. iv, 74a; Ulp. says that a public slave had even the power to test on it to the extent of a half, U. xx, 16. As it enabled its possessors to obtain credit in contracting, the praetors held it reasonable that the *paterfamilias* should be responsible to the extent of it for their contractual debts, G. iv, 73-74a, (see *Adjectician actions*, 3). The estate of a Junian latin continued by the Junian law to be a *quasi peculium*; and on the latin's death belonged in that character to his manumitter or his heirs, G. iii, 56, (see *Succession to Junian latins*).

PECULIUM CASTRENSE was the separate estate amassed by a *filius-familias* while on military service, G. ii, 106 and n. 1. He had greater power over it than over that confided to him by his father, (and which was often called *profecticium* to distinguish it from the *castrense*); for he might dispose of it by testament, U. xx, 10. He might do so while on active service by an informal *testamentum militare*, (see *Testament*, 25); but if he did so *per aes et*

PECULIUM CASTRENSE—*continued.*

*libram* after his discharge, neither his *paterfamilias* nor any one in the latter's *potestas* could assist at its execution as a witness or otherwise, G. ii, 106.

PECUNIA did not necessarily mean money, G. ii, 104 and n. 4, iii, 124.

PECUNIA CREDITA, meaning of, G. iii, 124.

PECUNIAE NON NUMERATAE, EXCEPTIO, G. iv, 116; see *Exception*, 9.

PEGASUS AND PUSIO, consuls in reign of Vespasian, authors of a *Sct.* extending the benefit of *causae probatio ex lege Aelia Sentia* to slaves irregularly manumitted after passing the age of thirty, G. i, 31; see *Aelia-Sentian law*, 7.

PEREGRINITY, the condition of those who, being free, were neither citizens nor colonial or Junian latins, though possibly Roman subjects, G. i, 193, (where the Bithynians, who were provincials, are expressly spoken of as peregrins). This seems to be the meaning which Gai. usually attaches to the word *peregrini*; although here and there the reference is solely to independent foreign nations, as in i, 79, 197 and 198, iii, 94.

1. *What meant by capacity and incapacity of peregrins.*—As the law of Rome was a compound of two elements, the *jus civile* and the *jus gentium*—that *quo omnes gentes utuntur*, G. i, 1, so, while it denied participation in the rights and institutions of the *jus civile* to any but citizens, or non-citizens to whom it had specially been conceded, it freely admitted peregrins to participation in those of the *jus gentium*; and even where it refused to recognise participation by them in some institution of the *jus civile*, it did not deny the possibility of their having kindred and corresponding institutions of their own. Thus, while it held *justae nuptiae* to be peculiar to citizens, it did not dispute the validity of marriage of peregrins *secundum leges moresque peregrinorum*, G. i, 92; it recognised amongst certain peregrins the existence of institutions that closely resembled the *patria potestas* and the *tutela mulierum* of Rome, G. i, 155, 193; and while it declared that only a citizen could make a testament according to Roman solemnities or take under one, it yet admitted that testamentary disposition was a practice among the nations generally, G. i, 189, and acknowledged the validity of a testament made by a peregrin *secundum leges civitatis suae*, U. xx, 14. It went still further; for it sustained as valid between peregrins transactions to which there was nothing that corresponded between citizens, such as the literal obligations by *chirographa*

PEREGRINITY—*continued*.

and *syngraphae*, G. iii, 134; and sometimes adopted the peregrin rule as to the consequences of a *juris gentium* contract when it was not a citizen but a peregrin that had thereby become bound, G. iii, 120.

2. *Their capacity in matter of marriage*.—They had no *conubium* with citizens unless by special concession, G. i, 56, U. v, 4. A peregrin woman marrying a citizen with whom she had *conubium* contracted *justae nuptiae*, *ibid.*, G. i, 76; but a peregrin man marrying a citizen woman under the same condition did not,—his marriage was as much a peregrin marriage as if he had married a peregrin, G. i, 77. If without *conubium* a citizen married a peregrin wife, the issue followed the condition of their mother, G. i, 67, (see *Status*, 2); if, also without *conubium*, a peregrin married a citizen wife, then, by the Minician law, though contrary to the rule of the *jus gentium*, the issue followed not their mother but their father, G. i, 78; but if in either case there had been on either side a mistaken belief of the existence of *conubium*, the defects of the marriage might be cured by *erroris causae probatio*, G. i, 75, (see below, No. 8).
3. *Their capacity in the other domestic relations*.—A peregrin had no *potestas* over his children in the Roman sense of the word, G. i, 55, 189: but he might appoint tutors to them, for such guardianship was *juris naturalis*, G. i, 89; though whether the Roman rules as to *auctoritas*, etc., applied to them may be doubted. He might own slaves, G. i, 52, and enfranchise them, (of course in so doing making them only peregrins like himself), G. i, 47; but, as regarded their manumission, he was not subject to the rules of the Aelia-Sentian law, except the one prohibition of manumission in fraud of creditors, which was extended by *senatusconsult* to provincial peregrins, *ibid.*
4. *Their capacity in matter of property*.—They could hold in property both *res Mancipi* and *res nec Mancipi* (which see), for they could own slaves, which were of the former class, G. i, 47, 52, U. xix, 1; but could not grant or take a conveyance of them by civil modes unless they had had a concession of *commercium*, U. xix, 4. In that case they could convey or take by mancipation (which see), *ibid.*; and probably in *jure cessio* and *usucapion* (see those words) were equally competent to them. But transfer of a *res Mancipi* to a citizen by a peregrin who had no *commercium*, though it was only by tradition, gave the transferee full quiritarian right, U. i, 16, note 2, whereas



PEREGRINITY—*continued.*

between citizens it would have made him only bonitarian owner (see *Bon. ownership*, 2), G. ii, 41, U. i, 16.

5. *Their capacity in matter of succession.*—They might make testaments according to their own law, U. xx, 14; but not in the manner prescribed for citizens, *ibid.* As they had no *testamenti factio* with citizens, G. ii, 218, U. xxii, 2, they could neither be instituted heirs in a citizen's testament, G. ii, 110, U. xxii, 2, nor appointed legatees, G. ii, 218; and although at one time they were allowed to take *fideicommissa*, yet by a Sct. of Hadrian's this also was prohibited, and such trust-gifts confiscated, G. ii, 285. As regards intestate succession, the Roman rules could not apply to them, for their foundation was in the *patria potestas* of the *jus civile*, and this peregrins did not possess; above, No. 2.
6. *Their capacity in matter of obligations.*—Most contracts being *juris gentium* they took part in them as freely and fully as citizens,—real contracts, G. iii, 132; verbal ones, G. iii, 93, except when the word *spondeo* was used, *ibid.*; and consensual ones, G. iii, 154. Even the literal one by *transscriptio a re in personam* was competent to them according to the Sabinian view, G. iii, 133; for it was but a novation of a prior *juris gentium* obligation (see *Literal obligations*, 1), and a peregrin might novate, G. iii, 179. They could not be parties to a *transscriptio a persona in personam*, for that was a purely civil *negotium*, G. iii, 133; but on the other hand they were bound by *chirographa* and *syngraphae*, which were peculiar to themselves, 134. They were responsible and entitled to redress for delicts as much as were citizens, G. iv, 37; the only obstacle arose when the penalties had been imposed by a statute in terms applicable only to citizens; how it was got over, see *ibid.* and below, No. 7.
7. *Their capacity in litigation.*—That peregrins could litigate before Roman magistrates, even in matters arising *inter se*, and that had to be settled by reference to the *jus gentium* or their own peculiar law, is manifest; for the peregrine praetorship was instituted on their behalf, G. i, 6 and n. 2, and the governors in the provinces had the same jurisdiction, G. i, 6. The *judicia* in which they were parties were necessarily *imperio continentia*, (see *Jud. legitima etc.*, 2), G. iv, 105, 109; and they might themselves act as *judices* or recuperators, *ibid.* There must occasionally have been peculiarities in the formulae of their actions; but the only case referred to is that of a peregrin suing

PEREGRINITY—*continued*.

or being sued on a statute which *in terminis* applied only to citizens, and then it was adapted to him by interpolation of a fiction of citizenship, G. iv, 37, (see *Fiction*, 3).

8. *How they acquired citizenship*.—When a peregrin man had married a citizen woman, or a citizen man had married a peregrin woman, under the mistaken belief that they had *conubium*, either of them who had laboured under the mistake was entitled, on the birth of a child,—for the remedy was intended primarily to create *potestas*,—to prove cause of error; one of the results being that the peregrin parent thereby became a citizen, G. i, 67–71, 74, (see *Erroris causae probatio*). The commonest mode of acquiring it was imperial grant on the peregrin's petition, G. i, 93, 94, ii, 135*a*, iii, 20; but it did not carry *potestas* over children already born or *in utero*, unless applied for and expressly conceded, (see *Patria potestas*, 12), *ibid*. It might also be acquired by *jus Latii* (see *Colonial latinity*, 2), when the peregrin belonged to a state to which that right had been granted, (in which case he was truly a colonial latin), G. i, 95 and 96, and note.

9. *How a citizen became a peregrin*.—The only cause referred to in the texts is *aqua et igni interdictio* (which see), G. i, 128 and n. 2, 161, U. x, 3, xi, 12.

PEREMPTORY EXCEPTIONS, G. iv, 121; see *Exception*, 5, 8, 9.

PERFECTA LEX, a law that annulled an act done in contravention of it, U. i, 1, note.

PERHIBERE TESTIMONIUM, G. ii, 104 and note 7.

PERMUTATIO, barter or exchange, G. iii, 141; see *Sale*, 2.

PERSONS form the subject-matter of Gaius' first book, and are thus classified:—

1. *Freemen and slaves*.—This is Gaius' first classification of persons, G. i, 9; see *Freedom, Slavery*. Freemen might be either *ingenui*, *i.e.* of free birth, or *libertini*, *i.e.* free by enfranchisement (see *Manumission*), 10, 11. The latter again might be either citizens, Junian latins, or ranked with *dediticians*, 12; see *Citizenship, Junian latinity, Deditician freedmen*.
2. *Citizens and peregrins*.—The latter class included not only foreigners, *i.e.* subjects of other states, G. i, 197, iii, 94, but also provincial non-citizen subjects of Rome, G. i, 193, and even Romans who had forfeited citizenship while retaining freedom, G. i, 128, U. x, 3; see *Citizenship, Peregrinity*.
3. *Persons sui and alieni juris*.—*Sui juris*, not subject to any family head, were *paterfamilias* and *materfamilias*, U. iv,

PERSONS—*continued*.

- 1 and note. *Alieni juris* or domestically dependent, G. i, 48, were slaves *in dominica potestate* (see *Slavery*), children *in patria potestate* (see *Pat. potestas*), women *in manu* (see *Manus*), and free persons *in causa mancipii* (see *Mancipii etc.*), G. i, 49, 52, 55, 109 f., 116 f. As regards the capacities and incapacities of the latter class, see *Alieni juris personae*, 2-4.
4. *Persons under guardians*.—Of persons *sui juris* pupils and in most cases women were under tutory; lunatics and prodigals, and in many cases minors, were in curatory, G. i, 142 f.; see *Tutory, Curatory*.
5. *Persons unborn*.—For some purposes a child *in utero* was regarded as already born, G. i, 147; see *Postumi*.
6. *Persons in fact and persons by fiction of law (natural and jural persons)*.—Personality was occasionally attributed to other entities than men; for *universitates*, such as *civitates* and *municipia*, could hold property, G. ii, 11, and might in some cases be instituted as heirs, U. xxii, 5, and take legacies and trust-gifts, U. xxiv, 28; the fisc claimed caducous inheritances and bequests, U. xvii, 2; and certain divinities might be made heirs under a testament, U. xxii, 6.

PERSONAL INJURY, *injuria*, G. iii, 220-225; see also *Delict*.

1. *Its nature*.—It included all varieties of assault and insult by act, speech, or writing, G. iii, 220. It might be offered to a man not only in his own person but also in that of free members of his family, entitling him in the latter case to redress both in their names and his own, 221. He might even suffer it through his slave, where something very atrocious was done to the latter, obviously meant in disrespect to his owner, 222; but a slave was never himself held to have suffered it, *ibid.* A free person *in mancipio* might suffer it at the hands of the party to whose *jus* he was subject, G. i, 141.
2. *Its penalties*.—Under the Twelve Tables there was a sliding scale of punishments, from talion down to a trifling fine, G. iii, 223; but the praetor authorised the sufferer—though not his heir, the wrong being so highly personal, G. iv, 112—to claim damages in an *actio injuriarum*, G. iii, 224. In the ordinary case the judge might at his discretion assess them at any figure within the sum claimed, *ibid.*; but in cases of *atrox injuria*, 225, the praetor taxed the amount in the *formula* (see *Condemnatio*, 2), and then the judge rarely went below it, 224.

- PICTURA, acquisition of property by, and respective rights of the artist and of the owner of the pannel painted on, G. ii, 78; see *Property*, 6.
- PIGNORIS CAPIO, one of the *legis actiones*, G. iv, 26–29, 31, 32; see *Legis actiones*, 6.
- PIGNUS, pawn or pledge, was a contract between creditor and debtor, created by delivery of some article by the latter to the former in security of a debt, and therefore completed *re*, (see *Real obligations*); but it is not mentioned by Gai. in describing the real contract, G. iii, 90 and 91, note, and in fact was not yet much developed in his time, *fiducia* (which see, No. 2) being still used for creation of a real security, G. ii, 60. The creditor holding a *pignus* was responsible to the debtor for its safe custody, G. iii, 203, 204; but the latter was not entitled to take it away from the former, and, if he did so surreptitiously, was held guilty of theft, 200. The creditor's right to sell it is attributed by Gai. to agreement to that effect with the debtor, G. ii, 64. The contract gave rise to the *actio pigneraticia*, which was *bonae fidei*, G. iv, 62.
- PISTRINI EXERCITIO, flour-milling, was one of the modes whereby a latin attained citizenship, G. i, 34, U. iii, 1; see *Junian latinity*, 7.
- PLANTATIO, acquisition of property by, and remedies of parties, G. i, 74, 76; see *Property*, 6.
- PLEBISCITUM, G. i, 3, and n. 2; see *Statute*, 1.
- PLEBS defined, G. i, 3.
- PLEDGE, see *Pignus*.
- PLENUM DOMINIUM, *plenum jus dominii*, ownership of a thing both in quiritarian and bonitarian right, G. ii, 41, iii, 80; see *Property*, 1.
- PLUS and MINUS in obligations depended on time or condition as well as quantity, G. iii, 113.
- PLUS PETITIO, excessive claim by a party in the *intentio* of a *certa formula*, G. iv, 53, (see *Intentio*, 3); it was impossible in one that was *incerta*, 54. There might be over-claim either in respect of amount, time, place, or circumstances, as illustrated in 53; and the result was that the pursuer altogether lost his cause, 53, fresh action being excluded, G. iii, 181.
- POENA SACRAMENTI, G. iv, 14, 95; see *Legis actiones*, 2.
- POENAE CAUSA INSTITUTIO, institution of an heir to a share of an inheritance, not out of regard for him, but as a means of coercing his co-heir to follow a particular line of conduct; such an institution was useless, G. ii, 243, (see *Testament*, 9). A legacy or trust-gift *poenae causa relictum* was also ineffectual, G. ii, 235, 288, U. xxiv, 17, xxv, 13, (see *Legacy*, 9, *Fideicommissum*, 5).



PONTIFICES, their *interpretatio*, G. ii, 42, note ; their early functions as judges, G. iv, 13, note 6 ; how their office was connected with *pons*, *ibid.*

POPULUS defined, G. i, 3.

POSSESSION could not be acquired *solo animo*, G. iv, 153. But the acquisitive act did not require to be done *in propria persona* by the party thereby becoming possessor ; it might be that of one of his slaves, of a *filiusfamilias*, or of a freeman or *servus alienus bona fide* possessed by him, G. ii, 89, 94. While it was admitted that possession might be acquired for a man by his wife *in manu*, a free person in his *mancipium*, or a slave of whom he had the usufruct, if property was acquired along with it, G. ii, 86, 87, yet it was a question whether possession by itself could be acquired or held by them for him to whom they were subject, for the reason that they themselves were not in his possession, G. ii, 90, 94. It might be retained for a man through a usufructuary, tenant, depositary, borrower, or other party holding in his name, G. iv, 153, and in some cases even by a mere effort of will, *ibid.* It was said to be *pro herede* when a man possessed a thing as and in the belief that he was heir, *pro possessore* when he did not impute his possession to any title, and knew he had no right to it, G. iv, 144. For the nature and effects of *bonae fidei possessio*, see that head ; for possession in reference to usucapion, see *Usucapion* ; and for the possessory remedies, see *Interdicts*, 5-9.

POSSESSORUM INTERDICTUM, G. iv, 145 ; see *Interdicts*, 5.

POSTLIMINIUM, see *Jus postliminii*.

POSTULATIO JUDICIS, one of the *legis actiones*, G. iv, 12, 17a, note, 20 ; see *Legis actiones*, 3.

POSTUMI, in reference to a testament, meant persons born after its execution ; in reference to intestacy, persons born after the death of the intestate.

1. Postumi sui *of a testator*.—A man might institute a child unborn as his heir or appoint tutors to him, whether *in utero* or not, provided such child, if born during his lifetime, would be in his *potestas*, G. i, 147, ii, 130, U. xxii, 15, 19. Not only might he institute such a *postumus*,—he was required either to institute or disinherit him if he wished to secure the validity of his testament, (see *Testament*, 10), G. ii, 130, U. xxii, 14, 15 ; for *agnatio postumi praeteriti* of either sex, provided it was born alive, caused *ruptio*, G. ii, 131, U. xxii, 18, (see *Testament*, 22).
2. Postumi sui *of an intestate*.—A child born after his father's death, who would have been in his *potestas* if born during

POSTUMI—*continued*.

his life, took *ab intestato* as one of the *sui heredes*, G. iii, 4, the agnates being inadmissible so long as the child was *in utero*, U. xxvi, 3; see *Intestate succession*, 3, 4.

3. *Postumi alieni* (or *extranei*).—Under this epithet were included not only children born to a third party after the execution of a testament or the death of an intestate, but even the testator's or intestate's own children born after such events respectively, if they could not fall within the number of the *sui heredes*, G. ii, 241; e.g. a grandchild through an emancipated son, or a son or daughter by a wife whom the law did not recognise as *justa uxor* (see *Marriage*, 1), *ibid.* Such *postumi* were regarded as *incertae personae*, and could neither be instituted heirs in a testament nor have legacies or trust-gifts left them, G. i, 147, ii, 241, 242, 287.

POTESTAS DOMINICA, see *Slavery*.

POTESTAS PATRIS FAMILIAS, see *Patria potestas*.

PRAECEPTIONEM, LEGATUM PER, see *Legacy*, 28, 29, 33, 34.

PRAEDIA, in its original meaning, lands mortgaged to the state by parties contracting with it, in security of their engagements, G. ii, 61; in its later meaning, lands generally, G. ii, 71, 72, iii, 145, etc.

PRAEDIATOR, PRAEDIATURA, G. ii, 61.

PRAEJUDICIUM, G. iv, 44; see *Actions*, 4.

PRAES, an early name for a surety, G. iv, 13, 16, 91, 94.

PRAESCRIPTIO, a clause prefixed to a *formula* (which see), G. iv, 132, either (a) to reserve a right of action to the pursuer which would have been lost by *consumptio actionis* (which see) if the *formula* had been unrestricted, 131, 131a, the same purpose being attained in *formulae* containing a *demonstratio* (which see) by limitative words in that clause, 136; or (b) to explain certain matters of fact necessary to qualify the technical meaning of the words of the *intentio* (which see), 134, 135, 137. A third class of prescriptions, prefixed for the sake of defenders, had given place, before the time of Gai., to exceptions, 133.

PRAESTARE, meaning, G. iv, 2, note 3.

PRAETERITIO in testaments, omission to mention a person that the law required should be instituted or disinherited; see *Testament*, 10.

PRAETOR, the,—his office and influence.

1. *The Praetor's office*.—The office of the *praetor urbanus* was established by or as an immediate consequence of the Licinian laws of 387 | 367, which opened the consulate to the plebeians; his prescribed duty being to

PRAETOR—*continued.*

administer justice to the citizens, G. i, 6 and n. 1. About 507 | 247, or a year or two later, a second praetor was appointed to administer justice to non-citizens, and between citizens and non-citizens, who got the name of *praetor peregrinus*, G. i, 6 and n. 2. They possessed, so far as necessary for the execution of their office, the same *imperium* or power of issuing and enforcing commands that had been exercised by the kings and was still exercised by the consuls, G. i, 98, 190, iv, 105, etc.; two of its most important elements being the *jurisdictio*, G. iv, 110, and the *jus edicendi*, G. i, 6. The number of praetors was afterwards increased, in order that some might be sent into the provinces and others exercise jurisdiction in particular matters; but the only one specially referred to in the texts is the *praetor fideicommissarius*, to whom all questions relating to testamentary trusts were remitted, G. ii, 278 and note, U. xxv, 12. In the time of Gaius the governors exercised in the provinces the same jurisdiction as did the urban and peregrin praetors in Rome, G. i, 6.

2. *The praetor's edicts.*—These were the rules which, usually on entering on office, they announced their intention to give effect to during their year's tenure of it; they were afterwards consolidated by Salv. Julianus in the reign of Hadrian, and embodied in a *Sct.*, G. iv, 104, note 1. This consolidation, except in G. i, 6 (where the plural is used), is what Gai. and Ulp. commonly refer to under the singular *edictum*, G. ii, 253, iii, 82, etc., U. xxviii, 4, xxix, 1, etc.: it seems to have been systematically arranged, and divided into titles, G. iv, 46. The aim of the praetors was to expedite, supplement, or correct the *jus civile* as general utility required, G. iv, 30, note 1, setting themselves to provide remedies for its *iniquitates*, i.e. the points in which it was inconsistent with natural equity, G. iii, 25, 41.
3. *Examples of the praetor's intervention.*—(a) In the law of persons:—maintaining in a state of *de facto* freedom slaves that, because of the informality, etc., of their manumission, were still *de jure* slaves,—afterwards rendered unnecessary by the Junian law, see *Junian latinity*, 1; giving minors the benefit of *in integrum restitutio*, which see; compelling tutors in certain cases to grant *auctoritas* to acts of their female wards of full age, see *Tutory*, 23. (b) In that of property:—recognition of bonitarian ownership (which see) and *bonae fidei possessio* (which

PRAETOR—*continued*.

also see) as independent rights *tutione praetoris*; protection of possession by the possessory interdicts, see *Interdicts*, 5–9. (c) In that of succession:—remodelling the systems of both testate and intestate succession by introduction of *bonorum possessio*, which see; granting to *sui heredes* power to hold aloof from their parent's succession when it was likely to be *damnosa*, see *Abstinendi potestas*. (d) In that of obligations:—giving creditors a claim against a *paterfamilias* in respect of the contractual debts of his *filiusfamilias* or slave, see *Adjectician actions*; rendering innocuous the rule of the *jus civile* that a creditor's claim was extinguished by his debtor's *capitis deminutio*, see *Fiction*, 3; putting creditors in possession of the estate of a bankrupt debtor, with power of sale, see *Emptio bonorum*.

4. *Praetorian remedies*.—It was in most cases by granting new remedies that the praetors accomplished the objects enumerated in No. 3. It may be added generally that it was they who worked out the formular system, see *Procedure*; that they sanctioned agency, see *Procuratory in litigation*; that they introduced many new direct actions, G. iv, 11, of which it was a peculiarity that they were not granted beyond a year from the date of the occurrence to which they referred, unless they were imitations of statutory ones, G. iv, 110, 111; that they invented the *utiles actiones* and *actiones in factum*, see *Actions*, 6; that it was they who introduced equitable exceptions, which see; and that by praetorian stipulations, of which there is an example in G. iv, 31, they endeavoured to guard against future damage by anticipatory securities.

PRECARIUM, a grant during the pleasure of the granter, on the solicitation of the grantee, G. ii, 60; *ab adversario precario possidere* was to retain possession notwithstanding recal of such a grant, G. iv, 150, etc.

PRINCIPAL AND ACCESSORY.—As regards accessions to property, see *Property*, Nos. 4, 6. An accessory obligation could never cover more than the principal one, G. iii, 126. *Ei quod nullum est nihil accedere potest*, G. iv, 151.

## PROCEDURE IN LITIGATION.

1. *Procedure by the legis actiones*.—Gaius' account of it is defective; for the nature of it generally, and the causes of its falling into disrepute, see *Legis actiones*.
2. *Transition to the formular system*.—Litigation *per formulas* was introduced by the Aebutian law about 507 | 247,



PROCEDURE IN LITIGATION—*continued*.

and made the ordinary procedure by the Julian judiciary laws, G. iv, 30 and notes. The *in rem actio per sponsionem* seems to mark the transition stage; for though a *formula* was adjusted the *sponsio* was almost a reproduction of the *sacramentum*, G. iv, 93, 94.

3. *Bringing a defender into court*.—See *In jus vocatio*.
4. *Contumacious failure to appear*.—When a debtor fraudulently kept out of the way, so as to render summons impossible, and no one appeared to defend him in his absence, his creditor was entitled to be put into possession of his estate and bring it to sale, the debtor in such a case being dealt with as a bankrupt, G. iii, 78; see *Emptio bonorum*, *Bankruptcy*.
5. *Agency*.—This was only exceptionally allowed in procedure *per legis actiones*, but was general under the formular system; see *Procuratory in litigation*.
6. *Securities required from the parties*.—See *Cautiones in judicial procedure*.
7. *Checks on reckless or vexatious action or defence*.—See *Vexatious litigation*.
8. *Adjustment of the formula or issue*.—This was the characteristic feature of the system,—an issue prepared by the magistrate, after hearing the parties informally, and being satisfied that there was a relevant case; it was sent down by him in writing to the judge (*judex*) or recuperators who were to try the cause, and contained authority to them to condemn or absolve, G. iv, 31, 34, 43, 105 and note; see *Formula*. It was necessary in a few cases to embody in it a reference to an old *legis actio*, but in the vast majority this was not required, G. iv, 32, 33. For its ordinary clauses, see *Formula*, 1. By means of interjected fictions of citizenship, heirship, usucapion, etc., the magistrate often adapted those *formulae* to the case of persons who otherwise would have been without a remedy, G. iv, 34–38, (see *Fiction*); by incorporated exceptions he brought under the notice of the judge matters of defence, statutory or equitable, which he would have to investigate, G. iv, 115–119, (see *Exception*); while by prefixed prescriptions he reserved to the pursuer future rights of action of which judgment on an unrestricted *formula* would have deprived him, G. iv, 130–132, or made explanations of importance from other points of view, 133–137, (see *Praescriptio*).
9. *Litiscontestatio*.—With adjustment of the *formula*, which ended the procedure *in jure*, there was *litis contestatio*,

PROCEDURE IN LITIGATION—*continued.*

*judicium acceptum, res in judicium deducta*, G. iii, 180, 181, iv, 114, 131; and with it a material change was operated on the position of parties, varying according as the *judicium* accepted was *legitimum* or *imperio continens*, G. iii, 180, 181, iv, 103–109, (see *Litis contestatio, Judicia legitima* etc.)

10. *Duty of the judge.*—In most *formulae* the judge (*judex*) was instructed to condemn or absolve in accordance with the evidence, G. iv, 43, etc.; where restitution of a thing was claimed he was not to condemn until he had made an order to restore and this had been disobeyed, G. iv, 162, 163; in some he was authorised to divide property and adjudicate shares to the parties, G. iv, 42; in a few he was merely to pronounce a finding, 44. In *bonae fidei judicia* (which see) his office was more than usually free, *liberum est officium*, G. iv, 114: it was his duty to allow set-off of compensatory claims arising out of the same matter, G. iv, 61, 63, 65–68, (see *Compensation*); and he was bound to acquit if the pursuer's demand was satisfied after issue joined,—a principle which the Sabinians held should be extended even to *judicia stricti juris*, G. iv, 114. In condemning, which he was obliged to do in money, G. iv, 48, his award required to be definite, 52. If the *condemnatio* (which see) of the *formula* was *certa* he could condemn in neither more nor less than the sum named in it without rendering himself liable in damages to the pursuer, *ibid.*; for the latter gained nothing by a judgment in excess of the judge's authority, and could not sue afresh because his claim had been extinguished *novatione* by the *litiscontestatio*, *ibid.*, note 2, iii, 181. Where the *condemnatio* was taxed he incurred the same penalty if he exceeded the *maximum*, G. iv, 52; where it was indefinite it was for him to fix the amount, 51.

11. *Res judicata.*—Judgment entitled the party in whose favour it had been pronounced to an *exceptio rei judicatae* to any new action in which his adversary attempted to reopen the same question, G. iv, 121.

12. *Execution.*—See *Judicatum*.

13. *Extraordinariae cognitiones.*—There were a few cases in which the procedure was not by *formula* and remit to a *judex*, but *extra ordinem*,—from first to last before the magistrate; we have an illustration in actions upon *fidei-commissa*, G. ii, 278 and note, U. xxv, 12.

14. *In integrum restitutiones, interdicts*, etc.—See those words. PROCINCTUS, G. ii, 101, U. xx, 2; see *Testament*, 2.

PROCULIANS, see *Sabinians and Proculians*.

PROCULUS, a jurist of distinction in the reigns of Claudius and Nero, who, on the death of the elder Nerva, became head of the sect founded by Labeo, and which was known afterwards as that of the Proculians, G. ii, 15, 195, 231, iii, 140, iv, 163.

PROCURATOR,—did his acquisition of property by tradition in his principal's name make the latter owner? G. ii, 95; what power had he of alienating his principal's property? G. ii, 64 and n. 2.

PROCURATORY IN LITIGATION, G. iv, 82–87.

1. *Such agency generally*.—Under the system of the *legis actiones* (which see) procuratory was incompetent except *pro populo*, *pro libertate*, or *pro tutela*, G. iv, 82 and n. 3; but under that of the *formulae* (which see) a man might sue or be sued either in person or by an agent, such as a cognitor, procurator, tutor, or curator, G. iv, 82. Certain persons, however, were not allowed to sue by a cognitor, and others were forbidden to act as such, G. iv, 124.
2. *Cognitors and procurators in particular*.—A cognitor was formally accredited by his principal to the other party by word of mouth, G. iv, 83; but for a procurator an informal mandate was sufficient, and he was entitled to act without it if he was in good faith and gave the other side *cautio de rato*, i.e. that his principal would abide by his acts,—a security usually required even when there was a mandate, 84.
3. *How they sued and were sued*.—When it was the pursuer that was represented by an agent, the latter formulated the *intentio* (which see) in the name of his principal, and the *condemnatio* (which also see) in his own favour, G. iv, 86; if he took the *intentio* in his own name, i.e. if he averred that he was owner, or that it was to him the defender was indebted, he necessarily failed, G. iv, 55; but fresh action was not excluded, there having been no *consumptio* (which see), *ibid.* If it was the defender that was represented by an agent, and the action a personal one, the pursuer averred in the *intentio* that the principal was his debtor, but in the *condemnatio* asked judgment against the agent, G. iv, 87; in a real action the *condemnatio* was in the same form, but of course neither principal nor agent was named in the *intentio*, *ibid.*
4. *Procuratory in rem suam*.—A claim (*obligatio*) was in itself intransferable, but the right to sue on it might be ceded, (see *Obligatio*, 4); in such a case the cessionary sued as the creditor's procurator, but on his own account, G. ii, 39.

PROCURATORY IN LITIGATION—*continued*.

The same practice was followed by the purchaser of an inheritance, G. ii, 252, (see *Emptio hereditatis*).

PRODIGALS, *prodigi*, dissipating their patrimony were interdicted the administration of their affairs, G. i, 53, and placed under curatory, sometimes of their agnates, sometimes of persons appointed by the praetors, U. xii, 2, 3, (see *Curatory*, 1); consequently they were incapable of making a testament, U. xx, 13.

PRO HEREDE POSSIDERE, PRO POSSESSORE POSSIDERE, G. iv, 144; see *Possession*.

PROMITTO, probable derivation, G. iii, 92, note.

PROPERTY, *dominium*, G. ii, 18–96, U. tit. xix.

1. *Tenures*.—Originally the law knew but one sort of property, *dominium ex jure Quiritium*, G. ii, 40; but, on the praetors declaring that they were prepared to recognise a beneficial ownership in a man whose legal title failed simply from defect in the form of his conveyance, a second sort sprang into existence, called ‘having a thing *in bonis*,’ G. i, 54, ii, 40, 41, now usually called bonitarian property, (see *Quiritarian ownership*, *Bonitarian ownership*). They were often separated, the quiritarian right being in one man, the bonitarian in another, in which case the former was spoken of as *nudum jus Quiritium*, the owner practically deriving no benefit, G. i, 54, iii, 166; when both were combined in the same individual, he was said to have *plenum jus*, G. i, 15, ii, 41. *Bonae fidei possessio*, though short of property, was a right much more valuable than the *nudum jus*, G. iii, 166, (see *B. f. possessio*).
2. *Its acquisition generally*.—Like other rights, it might be acquired either on a universal or on a singular title, G. ii, 97: the former when it came to a man as part of the *universum jus* of the old owner, as in *hereditas*, *bonorum possessio*, *emptio bonorum*, adrogation, and *manus*, (see those words), 98; the latter when it came to him as an independent and individual right, 97. Of both modes of acquisition, some were civil, others natural.
3. *Civil modes of singular acquisition*.—The most important were mancipation (which see), proper to *res Mancipi* (which also see), G. ii, 22, U. xix, 3; *in jure cessio* (which see), applicable alike to *res Mancipi* and *nec Mancipi*, U. xix, 9; usucapion (which see), also applicable to both, G. ii, 41–44, U. xix, 8; also adjudication, legacy, *caducum*, and *eraptorium*, (see those words), U. xix, 16, 17, and accretion in the case of manumission of a slave by one only of several joint owners (see *Adcretio*, 5), U. i, 18.



PROPERTY—*continued*.

4. *Natural modes of singular acquisition*.—Amongst those enumerated are tradition, G. ii, 19, 20, 65, U. xix, 7, (see below, No. 5); appropriation of a thing at the moment without an owner, G. ii, 66–68; capture from an enemy, 69; natural accession, as in the case of alluvion or imperceptible increment to land by deposit from a river, 70, 71, and the rising in a river of an island, which became the property of the riparian owner, 72; artificial accession, as the result of building, planting, sowing, painting, or writing, G. ii, 73–78, (see below, No. 6); and specification, G. ii, 79, (see below, No. 7).
5. *Tradition in particular*.—Tradition or delivery of *res Mancipi* carried only a bonitarian right, G. ii, 41, U. i, 16, unless it was by a peregrin to a citizen, and then it carried the *plenum jus*, U. i, 16, note 2; that of *res nec Mancipi* carried the quiritarian ownership, G. ii, 19–21, U. xix, 7. It was possible only in the case of corporeals, G. ii, 19, 28; and the conditions upon which it carried the property were (a) that the tradent was owner, and (b) that it proceeded on a title implying transfer not only of custody but of ownership, such as sale or donation, G. ii, 20, U. xix, 7.
6. *Artificial accession in particular*.—It was on the principle *accessorium sequitur principale* that, if A built on his own account on B's ground, the building became the property of B, G. ii, 73; but if A in possession was sued in a *rei vindicatio* by B, the former, if he had built in good faith, was entitled to resist with an *exceptio doli* (see *Exception*, 8) until reimbursed, 76. Exactly the same in both respects was the rule applied to *plantatio* and *satio*, planting or sowing in another person's ground, 74–76, with this qualification—that a plant did not change owners until it had coalesced with the soil by striking root in it, 74. The same principles were also applied to *scriptura*,—the writing of a treatise by A on the parchments of B; the treatise became B's property by accession to his parchments, 77. But in *pictura* the rule was different. If A in good faith painted a picture on B's pannel, the pannel was held to cede to the picture, and A became owner of both; but either suing the other in possession—for though A had the *vindicatio* proper, B was allowed an *utilis vindicatio*—might be defeated with an *exceptio doli*, if he did not first pay the value of the pannel or picture as the case might be, 78.
7. *Specification in particular*.—This arose when A used the materials of B, and out of them manufactured a new

PROPERTY—*continued*.

article, *nova species*,—wine out of grapes, or a vase out of metal: the Sabinians held that the new species belonged to the owner of the material; the Proculians that it belonged to the manufacturer, who would be liable however to an *actio furti* and *condictio furtiva* (see *Theft*, 6, 7) if he had used the material surreptitiously, G. ii, 79.

8. *Through whom property could be acquired*.—Property could not be acquired by the act of a stranger, though acting professedly as an agent, except *via possessionis*; and even this was doubtful, G. ii, 95. But it might be acquired for a man by those subject to his *jus*, G. ii, 86–96, U. xix, 18–21, except by *in jure cessio*, G. ii, 96, and, though Gai. and Ulp. do not refer to the matter, by adjudication (because it was a step in a litigation), *caducum* and *eraptorium*. Thus he might acquire through his wife *in manu*, his *filiifamilias*, his slaves, free persons *in mancipio*, freemen and *servi alieni bona fide* possessed by him, and slaves of whom he had the usufruct, G. ii, 86. It was not admitted, however, that he could acquire by usucapion through the instrumentality of wife *in manu*, free person *in mancipio*, or a usufructed slave, because none of these were in his possession, 90, 94. As regarded slaves usufructed or only in *bonae fidei* possession, his acquisitions through their instrumentality were limited to those that were due to their labour or his funds, 91, 92, U. xix, 21. A slave in the bonitarian ownership of one person, but quiritarian right of another, always acquired for the former, G. ii, 88, U. xix, 20. If owned jointly by several parties, he acquired ordinarily for all of them according to their respective interests as his owners, G. iii, 167; if, however, in taking a conveyance by mancipation he did so in the name of one of them in particular, the property was in the latter only, *ibid.* Whether the general rule was altered by the fact that the acquisition had been on the order of one of them in particular was matter of dispute between the schools, 167a.

9. *Alienation*.—While some owners could not alienate, non-owners sometimes could, G. ii, 62. Thus a husband, though owner, could not alienate dotal lands without his wife's consent, 63; but the agnatic curator of a lunatic, a procurator in certain cases, and a creditor holding a pledge, could alienate though not owners, 64. In some cases alienation was compulsory, as when a cruel owner was compelled to sell his slave, (see *Slavery*, 2), G. i, 53. In the case of women in regard to their *res mancipi*, and

PROPERTY—*continued*.

pupils generally, they could not alienate without their tutors' *auctoritas*, G. i, 192, ii, 80, 84, 85, (see *Women*, 4, *Pupils*).

10. *Remedies*.—Under the system of the *legis actiones* an owner employed for vindication of his property an *actio sacramenti*, G. iv, 16, (see *Legis actiones*, 2). Under the formular system, if he had the quiritarian right, he used either an *actio per formulam petitoriam*, which was the *rei vindicatio* properly so called (see *Vindicatio*), G. iv, 3, 91, 92, or an *in rem actio per sponsionem* (which see), G. iv, 91, 93; if he had merely a bonitarian right he employed the Publician action (which see), or one of the other fictitious actions devised by the praetors for those who had a thing only *in bonis* (see *Fiction*, 1, 2), G. iv, 34–36. When he wished to establish that his property was free from a servitude or other pretended burden, he used an *actio negatoria* (which see), G. iv, 3 and n. 1. If stolen from him, culpably damaged, etc., he had claim for redress; but the actions competent were upon the delict, and do not fall under this head; see *Theft*, *Wrongful damage to property*, etc.

PROPINQUITY as an impediment to marriage, G. i, 59–62; see *Marriage*, 4.

PROVINCES, the, were either popular, otherwise stipendiary, governed by proconsuls, or imperial, otherwise tributary, governed by the emperor's *legati*, G. i, 6 and n. 4, 101 and n. 1, ii, 21. In all of them, with exception of those portions that enjoyed the *jus Italicum* (which see), the *dominium soli* was held to be in the state or emperor, the occupants having only the possession or usufruct, G. ii, 7. At the same time this idea was not strictly followed out, for, while the land was not usucaptable, G. ii, 46, nor transferable by *in jure cessio*, 31, it was still said to be *res nec mancipi* and capable of transfer by tradition, 21. The governors had the same jurisdiction in the provinces as the urban and peregrin praetors in Rome, G. i, 6; in the popular ones quaestors supplied the place of the Roman curule aediles, and adopted the latter's edicts, *ibid.*; but no such officials were deputed to the imperial provinces, *ibid.* A great deal of Rome's statutory law had in the provinces no application, G. i, 47, iii, 121; but particular provisions were occasionally extended to them by senatus-consults, G. i, 47.

PRUDENTIUM RESPONSA, G. i, 7; see *Jus Romanorum*.

PUBERTY, when attained, G. i, 196, U. xi, 28.

PUBLICAE RES, G. ii, 11; see *Things*, 3.

PUBLICANI, farmers of the revenue, G. iv, 28, 32.

PUBLICIAN ACTION.—There are doubts as to its date and authorship, G. iv, 36, note. It was a praetorian *actio in rem* granted to a proprietor of a *res mancipi* (which see) who had acquired it merely by tradition, and had lost possession before completing his quiritarian right by usucapion, G. iv, 36, (see *Bonitar. ownership*, 3); as also to a *bonae fidei* acquirer *a non domino* in the same position, *ibid.*, (see *Bonae fidei possessio*, 2). Its feature was the presence of a fiction of usucapion contrary to fact, *ibid.* (see *Fiction*, 2). See style of the *formula*, *ibid.* and n. 2.

PUNISHMENT, capital, what? G. iii, 189 and 190, note 1.

PUPILLARY SUBSTITUTION, G. ii, 179–184, U. xxiii, 7; see *Substitution*, 2–4.

PUPILS were children *sui juris*, G. i, 142, under the age of puberty, G. i, 196, U. xi, 1, 28. It was according to natural law that a pupil should be under guardianship, G. i, 189; the guardian was in Roman law called his tutor, (see *Tutory*), G. i, 144, U. xi, 1. With the *auctoritas* of this tutor he might, if he had sufficient intelligence, be a party to any jural act, G. iii, 107, 109, except making a testament, G. ii, 112, U. xx, 12; though in some additional conditions were insisted in, as those of the Aelia-Sentian law (which see, No. 2) in reference to manumissions by owners under twenty, G. i, 40. Further, he was held responsible for delict if sufficiently old to understand the nature of his act, G. iii, 208. Without his tutor's *auctoritas* he could not alienate anything belonging to him,—neither property, G. ii, 80, 81, 84, U. xi, 27, nor a claim against a debtor, G. ii, 83, 84,—nor could he oblige himself by contract, G. iii, 107. But as it was a general rule that he might better his condition without *auctoritas*, though not worsen it, G. ii, 83, this anomaly arose,—that while he might make another his debtor by contract, G. iii, 107, and by accepting payment of the debt make the money he received his own without *auctoritas*, yet his debtor was not thereby discharged, G. ii, 83, 84. If, however, he afterwards raised action against his debtor, the latter was entitled to an *exceptio doli* (see *Exception*, 8), and, if he could show that the pupil had in fact benefited by the payment, thus defeated the action, 84. Receipt of an *indebitum* without *auctoritas* did not relieve a pupil from the obligation of repayment; for such an obligation arose *ex re*, not *ex contractu*, G. iii, 91. As regards the effect of a loan by him without *auctoritas*, see *Mutuum*, 2.



QUADRANS or quarter *as*, G. i, 122. In matter of testaments it was one-fourth of the *hereditas*, and in particular the Falcidian fourth, U. xxv, 17; see *Legacy*, 16.

QUAESTORS in the popular provinces had the same jurisdiction as the aediles in Rome, and used their edicts, G. i, 6.

QUANTI EA RES EST, G. iv, 163, note 1.

QUIRITARIAN OWNERSHIP, *dominium ex jure Quiritium*, was originally the only sort of property known to the Romans, G. ii, 40. Its symbol was a *quiris* or *hasta*, a spear, which as such was displayed in the centumviral court, G. iv, 16, and for which a citizen, vindicating his quiritarian right, substituted a rod, (*vindicta* or *festuca*), *ibid.* Afterwards it came to be distinguished from bonitarian property, G. ii, 40, (see *Property*, 1, *Bonitarian ownership*, 1); and when the two were dissociated, was spoken of as the *nudum jus Quiritium*, G. i, 54, iii, 166. It gave its holder no beneficial interest in that over which the right extended, *e.g.* no *potestas* over a slave, G. i, 54, nor any right to his acquisitions, G. ii, 88, iii, 166, unless the slave in acquiring expressly declared that the acquisition was for him, G. iii, 166. At the same time it was only a quiritarian owner that could make a slave a citizen by manumission (which see, No. 2), G. i, 17, U. i, 16; and it was he, and not the bonitarian manumitter, that became tutor of a latin freedman, (see *Junian latinity*, 5), G. i, 167, U. xi, 19.

QUORUM BONORUM, an interdict granted to a *bonorum possessor* to enable him to obtain any of the *res hereditariae* from an individual in possession *pro herede* or *pro possessore*, G. iii, 34, iv, 144; see *Interdicts*, 5.

RAPINA, see *Robbery*.

RATO, CAUTIO DE, see *Procuratory in litigation*, 2.

REAL OBLIGATIONS, G. iii, 90, 91. An *obligatio re contracta*—not to be confounded with an *obligatio ex re*, which was one created by facts and circumstances independent of contract, G. iii, 89, note 1—was one arising out of a contract completed by an act done, G. iii, 89 and n. 1. The only one mentioned by Gai. in explaining the nature of such contracts is *mutuum* (which see), 90; for the obligation to refund money paid by mistake when not due (see *Indebiti solutio*), mentioned by him in the same place, though an *obligatio ex re*, yet was not referable to contract, 91. Commodate, deposit, and pledge (see these words) he mentions only incidentally in other places. The innominate contracts (see *Contract*, 1) were regarded as real, G. iii, 89, note 1.

REAL SECURITIES, see *Fiducia, Pignus, Praedia*.

RECUPERATORS, G. i, 20, iv, 46, 105 and note, 185; U. i, 13.

REGULA CATONIANA, G. ii, 244; see *Legacy*, 12.

REI VINDICATIO, see *Vindicatio*.

RELIGIOSAE RES, G. ii, 4, 6, 7; see *Things*, 1.

REMANCIPATION of a woman *in manu*, G. i, 118, 137*a*; see *Manus*, 6.

REPLICATION, Duplication, Triplication, etc., G. iv, 126–129.

Replication was the pursuer's reply to an exception (which see), suggesting facts which, if proved, would render it unfair to him that the exception should be sustained, 126, 126*a*. Duplication was the defender's answer of a similar nature to the pursuer's replication, 127; and the series might be continued to triplication and even farther, 128, 129. All of them were engrafted on the *formula* in much the same manner as the exception, 126, 126*a*.

RESIDUAE, EXCEPTIO REI, G. iv, 122.

RES JUDICATA and *exceptio rei judicatae*, see *Procedure*, 11.

RES MANCIPI AND NEC MANCIPI.—The distinction was of importance in the matter of conveyance, the former requiring mancipation, *in jure cessio*, or usucapion (see those words) to give the transferee a quiritarian right, while in the latter this passed by simple tradition (see *Property*, 5), G. i, 120, ii, 19–23, 41, U. xix, 3, 7–9. *Mancipi res* included lands and houses *in italico solo* (see *Jus Italicum*), rural praedial servitudes, slaves, and domestic beasts of burden—oxen, horses, mules, and donkeys, G. i, 120, ii, 15, 17, U. xix, 1; all others, including provincial lands not enjoying italic privilege, G. ii, 15, 21, urban servitudes 17, and money, 81, were *res nec Mancipi*. If a *res Mancipi* was neither mancipated nor ceded, but only delivered, the transferee had it only *in bonis*, *i.e.* became only bonitarian owner, (see *Bonitar. ownership*); but by completing his usucapionary possession, he cured the defect, G. ii, 41, 204, U. i, 16, (see *Usucapion*, 2). The explanations Gai. gives of the derivation of the phrase *res Mancipi*, *i.e. Mancipii*, are various and inconsistent, G. i, 121, ii, 22, iv, 16.

RESPONSA PRUDENTIUM, G. i, 7; see *Jus Romanorum*.

RESTITUTIO IN INTEGRUM, see *In integr. restitutio*.

RETENTION, rights of, competent to husband in restoring dowry, U. vi, 9–17; see *Dowry*, 6.

REUS and ACTOR, defender and pursuer, G. iv, 16, note 4, 57, 157, 159, 160.

REX SACRORUM, G. i, 112.

ROBBERY, *vis bonorum raptorum, rapina*, under the early law was dealt with as theft, but by the praetors as a special offence,

ROBBERY—*continued*.

punishable, however trifling, in an *a. vi bonorum raptorum*, with four-fold restitution within the year, and single value afterwards, G. iii, 209.

ROGATIO LEGIS, enactment of a law, U. i, 3.

RUPITIAS SARCIRE, G. iii, 210–219, note.

RUPTIO TESTAMENTI, see *Testament*, 22.

RUTILIUS RUFUS, P., praetor *a. u. c.* 636, consul 649, was the author of the bankruptcy procedure by *emptio bonorum* (which see), and of the *a. Rutiliana* granted to the *bonor. emptor*, G. iv, 35.

SABINIANS AND PROCULIANS, two schools or sects of the jurists in the early empire, G. i, 196, note 1, iii, 71, note, to a great many of whose controversies Gai. alludes, as in i, 196; ii, 15, 37, 79, 123, 195, 200, 217–223, 231, 244; iii, 87, 98, 103, 140, 141, 167*a*, 168, 178; iv, 78, 79, 114. The founder of the first, C. Ateius Capito, he does not mention; but of his successors he specially refers to Massurius Sabinus (from whom the school took its name), Caelius Sabinus, C. Cassius Longinus (from whom its other name of *Cassiani*, U. xi, 28, was derived), Javolenus Priscus, and Salvius Julianus. He usually refers to the Sabinians as *nostri praeceptores*, he having been an adherent of that sect. The Proculians he usually refers to as *diversae scholae auctores*; but he specially mentions M. Antistius Labeo, their founder, M. Cocceius Nerva, his successor, Proculus, from whom the school took its name, and Pegasus; and Ulp. mentions Neratius Priscus. See those names individually.

SABINUS, CAELIUS, consul A.D. 69, and chief of the Sabinian school after Massurius Sabinus; quoted in G. iii, 70, 141. See *Sabinians and Proculians*.

SABINUS, MASSURIUS, succeeded Capito (who died A.D. 22) as chief of his school; from him it got the name by which it is best known. He is specially referred to by Gai. in ii, 79, 154, 195, 218, 244; iii, 133, 161, 183; iv, 79, 114. See *Sabinians and Proculians*.

SACRA FAMILIAE, G. ii, 55; *coemptio sacrorum interimendorum causa*, (see *Manus*, 7), G. i, 114, note 1.

SACRAE RES, G. ii, 3–5; see *Things*, 1.

SACRAMENTUM, *legis actio per*, G. iv, 13–17; see *Legis actiones*, 2.

SACRIFICE, *pignoris capio* used in connection with, G. iv, 28 and notes; see *Legis actiones*, 6.

SALE, *emptio venditio*, G. iii, 139–141; see also *Consensual obligations*.

1. *Sale, what?*—It was a consensual contract, G. iii, 135, con-

SALE—*continued*.

ditional or unconditional, 146, whereby the seller, *venditor*, undertook to deliver to the purchaser, *emptor*, a certain saleable article in consideration of a price, and was complete the moment they were agreed about the latter, 139; earnest, *arra*, was unnecessary, being merely evidence of the completion of the transaction, *ibid.* Cases sometimes occurred in which it was difficult to say whether the contract was one of sale or location, 145-147; see some of them under *Location*, 3.

2. *The price in particular*.—It required to be definite, *certum*, G. iii, 140; the jurists being of different opinions as to whether it was sufficient that it was left to be fixed by a third party named, *ibid.* And it required to be in current money, 141; though the Sabinians, differing from the Proculians, thought otherwise, holding barter, *permutatio*, to be only a variety of sale, *ibid.*
3. *Sale by auction*.—See G. iv, 126a and note.
4. *The actions arising out of the contract*.—The buyer had the *a. empti* (or *ex empto*), the seller the *a. venditi* (or *ex vendito*), both of them *bonae fidei*, G. iv, 62. If the purchaser was sued for the price before delivery, he might plead the *exceptio rei nondum traditae*; but the replication was good that it was one of the conditions of the sale that the price was to be paid first, G. iv, 126a.

SALVIANUM INTERDICTUM, G. iv, 146; see *Interdicts*, 5.

SANCTAE RES, G. ii, 8; see *Things*, 1.

SARCIRE RUPITIAS, G. iii, 210-219, note.

SATIO, seed-sowing, acquisition of property by, G. ii, 75; remedies, 76. See *Property*, 6.

SATISDARE, meaning, G. i, 199 and 200, note.

SCAEVOLA, Q. MUCIUS, G. i, 188 and n. 4, iii, 149, aedile, consul, proconsul in Asia, and finally *pontifex maximus*, assassinated 672 | 72, a very distinguished jurist, who reckoned Cicero amongst his pupils. His writings were a subject of comment by Gai., who refers to his treatise on them in i, 188.

SCHOLAE JURISCONSULTORUM, G. i, 196, note 1; see *Sabinians and Proculians*.

SCRIPTURA, acquisition of property by, G. ii, 77; see *Property*, 6.

SECTIO BONORUM, sale of a confiscated estate *per universitatem*, G. iv, 146.

SECTORIUM INTERDICTUM, G. iv, 146; see *Interdicts*, 5.

SECUNDARIUM INTERDICTUM, G. iv, 170; see *Interdicts*, 17.

SECURITY, real, see *Praedia*, *Fiducia*, *Pignus*; personal, see *Praes*, *Cautiones*, *Satisdare*, *Suretyship*.



SECUTORIUM JUDICIUM, G. iv, 166, 169 ; see *Interdicts*, 16.

SEMIS, a half *as*, G. i, 192.

SENATORS and their children were forbidden by the Julian law to marry freedwomen, actresses or children of actors, and women of disreputable character, U. xiii, 1, 2 ; if they did, they and their wives were not allowed to take under each other's testament, xvi, 2. Personal injury offered to them was *atrox*, and punished with more than usual severity, G. iii, 225. When charged criminally they were entitled to be tried by their peers of the senate, U. xiii, 2 and n. 2.

SENATUSCONSULTS, *senatus consulta*, enactments of the senate, (see *Statute*, 1), G. i, 4. Specially referred to are the following:—

*Calvitianum* (reign of Nero ?), declaring that marriage between a man under sixty and a woman over fifty should not qualify for taking an inheritance, legacy, or dowry, U. xvi, 4 and n. 2 ; see *Marriage*, 7.

*Claudianum*, on cohabitation of freewomen and slaves, G. i, 84, 85 and notes, 91, 160, U. xi, 8 ; see *Claudian Sct.*

*Claudianum*, modifying the Pernician Sct., by declaring that a man over sixty marrying a woman under fifty should not be liable to the penalties of celibacy, U. xvi, 4, and note to § 3 ; see *Julian and Papia-Poppæan law*, 4, *Jus capiendi*.

*Hadriano auctore*. One or more regulating birth status (see *Status*), G. i, 30, 77, 80, 81, 92, U. iii, 3 ; one extending to peregrins the Aelia-Sentian prohibition of manumission in fraud of creditors (see *Aelia-Sentian law*, 1), G. i, 47 ; one allowing women in tutelage to make a testament without fiduciary coemption, G. i, 115a, ii, 112, (see *Testament*, 8, *Manus*, 7) ; one declaring that *usucapio pro herede* should be no bar to the heir's *hereditatis petitio*, G. ii, 57, (see *Usucapion*, 6) ; one amending the law of *erroris causae probatio* (which see, No. 2), G. ii, 143 ; one prohibiting *fideicommissa* to persons who were not allowed to be instituted as heirs or to take legacies, 285, 287, (see *Fideicommissum*, 3) ; one in favour of latins who had obtained a grant of citizenship without consent of patrons, G. iii, 73, (see *Patronate*) ; and one defining the rights of municipalities as legatees, U. xxiv, 28, (see *Legacy*, 6).

*Largianum*, A.D. 42 (?), amending the law of succession to Junian latins, G. iii, 63 and note, 64–67 ; difficulties in applying it, 69–71. See *Succession to Junian latins*.

*Maximo et Tuberone coss. factum*, 743 | 11 (?), declaring that confarreation of *flaminica Dialis* should place her in

SENATUSCONSULTS—*continued.*

*manu* only as concerned the *sacra*, G. i, 136 and note; see *Manus*, 1.

*Neronianum*, declaring that when a legacy was invalid in the particular form in which it was bequeathed, it should, if possible, be sustained as one *optimi juris*, i.e. by damnation, G. ii, 197, 198, 212, 218, 220, 222, U. xxiv, 11a; see *Legacy*, 20, 26.

*Orphitianum*, A.D. 178, giving children a right of succession to their mother, G. iii, 33a and note, U. xxvi, 7 and notes; see *Intestate succession*, 7.

*Pegasianum*, in reign of Vespasian, regulating *fideicommissa*, G. ii, 254, 258, 259, U. xxv, 14–16. (A *Setum. Pegasianum* is also mentioned in G. ii, 286a; it is possibly a mistake for *Plancianum*). See *Fideicommissum*, 9.

*Pegaso et Pusione coss. factum*, in reign of Vespasian, extending the benefits of the Aelia-Sentian marriage and *causae probatio* to latins manumitted when over thirty, G. i, 31 and note, iii, 5, 73, U. iii, 4; see *Aelia-Sentian law*, 7.

*Pernicianum* (? *Persicianum*, and A.D. 34), declaring that the penalties of celibacy should adhere permanently to men and women who had not married before sixty or fifty respectively, U. xvi, 3 and note; see *Julian and Papia-Poppaeian law*, 4.

*Plancianum*, imposing penalties on heirs secretly promising to convey *fideicommissa* to persons not entitled to take them, U. xxv, 17 and notes 2 and 3. (The name is not in the text, but obtained from the Dig.; and the *Set.* may be the same as that attributed to Hadrian in G. ii, 285, 287). See *Fideicommissum*, 3.

*Tertullianum*, in reign of Hadrian, giving a mother a right of succession to her children, G. iii, 33a and note, U. xxvi, 8; see *Intestate succession*, 7.

*Trebellianum*, A.D. 62, regulating *fideicommissa*, G. ii, 253 and n. 2, 255, 258, U. xxv, 14, 16; see *Fideicommissum*, 8.

*Of unknown name and authorship.*—One introducing *erroris causae probatio* (which see), G. i, 67–71, ii, 142; one or more amending the law of tutory of women, G. i, 173, 174, 176, 177, 180, U. xi, 20–23, (see *Tutory*, 13, 22); one providing that a pupil should have an Atilian tutor instead of him who had been excused or removed, G. i, 182, (see *Tutory*, 4); one prohibiting a man (not insolvent) to institute as his heir with freedom one of his own slaves under thirty, G. ii, 276 and note, (see *Testament*, 14); one conferring citizenship on a free-born latin woman on the birth of her third child, U. iii, 1 and note, (see *Junian*

SENATUSCONSULTS—*continued*.

*latinity*, 7); one abridging the period of service in the night watch, as qualifying a latin for citizenship, to three years, U. iii, 5, (see *Junian latinity*, 7); one allowing municipalities to be instituted heirs by their freedmen, and to take *fideicommissa* from any quarter, U. xxii, 5, (see *Testament*, 13, *Fideicommissum*, 3); one or more authorising certain deities to be instituted as heirs, U. xxii, 6, (see *Testament*, 13); one sanctioning quasi-usufruct of money, U. xxiv, 27, (see *Usufruct*, 2).

SERVITUDES, *servitutes*, *jura praediorum*, rights appurtenant to immoveables, were either rural or urban, G. ii, 14. Rural servitudes, viz. rights of way and aqueduct, G. ii, 31, iv, 3, U. xix, 1, were *res Mancipi* (which see) in districts of italic right (see *Jus Italicum*), U. xix, 1, and creatable by mancipation or *in jure cessio* (see those words), G. ii, 29, 31; in the provinces generally they were *nec Mancipi*, and creatable by pacts and stipulations, 31. Urban ones, including rights of light, prospect, gutter, and eaves-drop, G. ii, 14a, 31, iv, 3, were everywhere *nec Mancipi*, G. ii, 15, 17; in italic lands they might be created by *in jure cessio*, 29, and in the provinces by pacts and stipulations, 31. Either sort might be vindicated in an *actio in rem*, G. iv, 3, their existence challenged in an *a. in rem negatoria*, *ibid*.

SERVIVS Sulpicius Rufus, sometimes referred to simply as Servius, G. i, 188 and n. 5, ii, 244, iii, 149, 179, 183, consul 703 | 51, and one of the most distinguished jurists of his day.

SESTERCE, the, was equal to 2½ and afterwards 4 *asses*, G. iv, 95, note 2.

SET-OFF, see *Compensation*.

SINENDI MODO LEGATUM, see *Legacy*, 25–27, 33, 34.

SLAVERY, *servitus*, an institution of the *jus gentium*, G. i, 52.

1. *How created*.—It was ordinarily created in the first instance by capture of an enemy, G. i, 129, and perpetuated by birth, the offspring of a slave mother being also slave, G. i, 82, U. v, 9. In addition the Twelve Tables made reduction to slavery the punishment of manifest theft by a freeman, (though a milder penalty was substituted by the praetors), G. iv, 189. A citizen evading the census was sold as a slave by way of punishment, G. i, 160, U. xi, 11. The Claudian Sct. (according to Paul, though only to be inferred from Gai.) punished with slavery a freewoman cohabiting with a man she knew to be a slave, G. i, 86, and visited with the same penalty one continuing to cohabit with a *servus alienus* after his owner had informed

SLAVERY—*continued.*

her of his condition, G. i, 91, 160, U. xi, 11, (see *Claudian Sect.*). Further, the Aelia-Sentian law provided that deditecian freedmen contravening its prohibition of residence within a hundred miles of Rome should be sold as slaves on the same condition, and never manumitted; and that if they were manumitted they should then become slaves of the state, G. i, 27.

2. *Powers of an owner over his slave's person.*—According to the *jus gentium* an owner had the power of life and death over his slave, G. i, 52; and it seems to have been not uncommon to put him in chains, to brand him or torture him, and to give him up to fight in the arena as a gladiator or with wild beasts, G. i, 13. By Ant. Pius, however, it was enacted that a man killing his own slave should be liable to the same penalties as for killing a *servus alienus*, G. i, 53; while if he causelessly subjected him to cruel treatment he was to be compelled to sell him, *ibid.* Voluntary sale of a slave was of everyday occurrence, G. iv, 40, for he was an article of property, a *res Mancipi*, U. xix, 1. Like other things of the same class (see *Res Mancipi*) he might be in *in bonis* of one man and in the quiritarian right of another, U. i, 16; but it was the former that had *potestas* over him, G. i, 54.
3. *Right of the owner to his slave's acquisitions.*—See *Property*, 8, *Obligation*, 8.
4. *Effect of the slave's institution in a testament.*—See *Testament*, 14, *Necessarii heredes*.
5. *His peculium.*—See *Peculium*.
6. *Extent of owner's responsibility for his contracts or delicts.*—See *Adjectician actions*, *Noxal actions*.
7. *How far a slave could himself be debtor or creditor.*—Gai. states the rule very broadly that a slave could not be under obligation either to his owner or any other person, G. iii, 104; consequently if he committed a delict against his owner the latter had no action, G. iv, 78; and a new obligation in which he was nominal debtor was so useless as to be ineffectual as a novation of a previous valid one, G. iii, 177. But elsewhere Gai. admits that he might be indebted naturally (see *Obligation*, 5) either to his owner or a third party, and his obligation be validly guaranteed by a surety, G. iii, 119a. That a slave could not be creditor is evidenced in the fact that his adstipulation (which see) was null, G. iii, 114.
8. *How a slave acquired freedom.*—See *Manumission*.
9. *Judicial remedies.*—An owner was entitled to protect his



SLAVERY—*continued.*

possession of and property in his slaves, just as in his other chattels, by interdicts, G. iv, 160, and *rei vindicationes*, G. iv, 41. If his slave was stolen from him he had an *actio furti* and *condictio furtiva*, see *Theft*, 6, 7; if culpably killed or hurt, he had an action on the Aquilian law, G. iii, 210, 217, (see *Wrongful damage to property*, 1, 3); if intentionally assaulted in such a way as to indicate that insult was intended to his owner, the latter had an *actio injuriarum*, G. iii, 222–224, (see *Personal injury*); if his morals were debauched, and his value consequently diminished, he had an *a. servi corrupti*, G. iii, 198. If a controversy arose between owner and slave on the question of freedom, the latter had to be represented by an *adsertor libertatis*, G. iv, 14 and n. 2; but, under the system of the *legis actiones* (which see, No. 2), out of favour for freedom, the *sacramentum* required from the *adsertor* was the smallest known to the law, G. iv, 14.

SOLDIER, a, in several respects enjoyed privileges unknown to civilians.

While on service he might make a testament without any formalities, and make in it institutions and bequests that would have been ineffectual had he tested like a civilian *per aes et libram*, G. ii, 109–111, 114; see *Testament*, 25. A *filiusfamilias miles* might test on his *peculium castrense* (which see), and that either informally while on service, or *per aes et libram* after his discharge, G. ii, 106, U. xx, 10. Occasionally a soldier honourably discharged had conferred upon him a sort of *conubium* at large, enabling him to marry any peregrin or latin he pleased, and yet have his marriage recognised as *justum matrimonium* (see *Marriage*, 1), G. i, 57. Under the earlier system of procedure he had *pignoris capio* (see *Legis actiones*, 6) to recover his *aes militare*, *equestre*, and *hordiarium*, G. iv, 27.

SOLITARIUS PATER, the father of but one child, U. tit. xiii, rubric, was exempt from the penalties imposed upon *orbitas*, childlessness, by the Julian and Papia-Poppaeian law (which see, No. 5), and therefore might take in full under a stranger's testament, tit. xiii, note.

SOLUM ITALICUM, see *Jus italicum*.

SPADONES were allowed to adopt, G. i, 103.

SPECIFICATION, acquisition of property by, and remedies of parties prejudiced, G. ii, 79; see *Property*, 7.

SPENDTHRIFTS, see *Prodigals*.

SPONDEO, origin of word, G. iii, 92, note; it could not be used by a peregrin or slave, but only by a citizen, G. iii, 93, 119, 179.

SPONSIO, as stipulation, see *Stipulation* ; as a surety's engagement, see *Suretyship*.

SPONSIO ET RESTIPULATIO were used in the interdicts *uti possidetis* and *utrubi* to raise issue for trial of the question of possession, G. iv, 166 ; as each party was both pursuer and defender, there were two sponsions and two restipulations, and all were penal, *i.e.* their amounts were exigible by the successful litigant, 166*a*, 167, (see *Interdicts*, 15). They were used in the *a. de pecunia certa credita* and *a. de pecunia constituta* to check precipitate litigation, the sum named in them being the penalty of the ill-founded action or defence, G. iv, 13, 171, 172, 180, (see *Vexatious litigation*). The sponson in the *in rem a. per sponsionem* (which see) was used merely to raise an issue, G. iv, 93 ; being prejudicial only, and not penal, there was no restipulation, 94.

SPONSIONEM, IN REM ACTIO PER, see *In rem a. per sponsionem*.

SPURII, why so called, G. i, 64 ; were in law fatherless, *ibid.*, U. iv, 2 ; word did not include issue of a concubine, G. i, 64, note 3. See *Parent and child*, 5.

STATULIBER, U. ii, 1–6, was a slave with conditional testamentary gift of freedom ; who, if not alienated, continued to belong to the heir till the condition was fulfilled, G. ii, 200, U. ii, 1, 2, and if alienated, carried with him his conditional enfranchisement, U. ii, 3. If the condition was defeated by the act of the heir or a third party whose co-operation was necessary to its fulfilment, it was held as fulfilled, and the slave was free, U. ii, 6.

STATUS of children on birth, G. i, 65–92.

1. *Free or slave?*—The rule of the *jus gentium* was—free mother, free child ; slave mother, slave child, G. i, 82, U. v, 9. This rule was considerably modified by the Claud. *Set.*, some of whose provisions were repealed by Vespasian and Hadrian, 84–86 ; see *Claudian Set.* But though a mother might be slave at the time of conception, yet, if she was free when her child was born, it also was free, G. i, 89 ; the rule being that the status of illegitimate children dated from their birth, not from their conception, *ibid.*, U. v, 10. That of legitimate children, on the other hand, was held to date from the earlier point, *ibid.* ; therefore it was maintained that if a child had been conceived in lawful marriage, it was not the less free-born because its mother had been reduced to slavery during her pregnancy and was in that condition when delivered, G. i, 91.

2. *Citizen, latin, or peregrin?*—When the parents were both of the same condition there was no difficulty about the

STATUS—*continued*.

status of the issue; when they were of different conditions the rule was that if there was *conubium* (which see) the child followed the father, while without it it followed its mother, G. i, 56, 67, U. v, 8. This was invariable where there had been no marriage, and the child was the issue of a casual connection, in law fatherless; the mother's status at her delivery determined whether the child was citizen or peregrin, G. i, 90, 92. But when the child had been conceived in marriage, though without *conubium*, the general rule was qualified by the Minician law, which declared that the issue of such a marriage should follow the status of the inferior parent, G. i, 78, U. v, 8; a provision which in turn was modified by an enactment of Hadrian's, that the issue of a latin husband and Roman wife should in every case be a citizen, G. i, 80.

3. In potestate or sui juris?—Although it was a general rule that the issue of *justae nuptiae* were in potestate, G. i, 56, yet in particular cases a question might arise whether or not there was *potestas*, of which an instance occurs in G. i, 135.

## STATUTE, G. i, 2-7, U. i, 1-3.

1. *The various forms of statute law*.—The original form was the *lex* or comitial enactment, G. i, 3; the *plebiscitum*, passed by the *concilium plebis*, was obligatory at first only among the plebeians, but by the Hortensian law was declared binding on the patricians as well, and thus became of the same value as a *lex*, *ibid.* and n. 2. After some hesitation *senatusconsults* were also recognised as having all the force of *leges*, 4; and this was never doubted as regarded the *constitutiones principum* (which see), 5. The praetors' edicts and the responses of the jurists, though part of the *jus scriptum*, are not said to have been regarded as statute-law, 6, 7, and the first are pointedly put in opposition to it in G. iii, 32. On laws perfect, imperfect, and short of perfect, see U. i, 1, 2.
2. *Analogical extension of statute*.—The *interpretatio* of the pontiffs and early jurists frequently carried the application of a statute beyond its letter, G. ii, 42, note. For instance the XII Tables conferred on agnates rights both of succession and tutory, but on patrons only the former; by interpretation it was ruled that they were entitled also to the latter, G. i, 165, U. xi, 3. Going a step further they held that a *parens manumissor* (see *Emancipation*, 3) must be dealt with as a patron, and therefore

STATUTE—*continued.*

was entitled to both the tutory and succession of the child he had emancipated, G. i, 166, iii, 40, 41, U. xxviii, 7 and n. 1, as amended in *Additions etc.*

3. *Personal and territorial application.*—Much of the statutory law applied directly only to citizens, *e.g.* the Twelve Tables and the much later Aquilian and Aelia-Sentian laws, G. iv, 37, i, 47; if it seemed reasonable that a non-citizen should have the benefit of or be ruled by any of their provisions, the praetor adjusted a *formula* embodying a fiction of citizenship (see *Fiction*, 3), G. iv, 37. Some statutes again, such as the *lex Atilia*, did not apply beyond Rome, U. xi, 18; others not beyond Italy, such as the *lex Furia de sponsu*, G. iii, 121a, 122; while others, such as the *lex Apuleia*, extended to the provinces as well, 122.

STIGMATA, distinctive marks branded on runaway slaves, G. i, 13, U. i, 11 and n. 1.

STIPENDIARIA PRAEDIA, G. ii, 15, 21; see *Provinces*.

STIPULATION, *stipulatio*, G. iii, 92–109; see also *Verbal obligations*.

1. *Stipulation, what?*—It was a verbal contract by question and answer, G. iii, 92, creative only of a unilateral obligation, 137. Its form rendered it possible only *inter praesentes*, 136, 138; but the resulting inconvenience when a man had occasion to contract with a person at a distance was obviated by an expedient explained in 136, note 1. Though most stipulations were voluntary or conventional, yet some were necessary, such as the *cautio judicatum solvi* and *stipulatio pro praede litis et vindictiarum*, G. iv, 91, *stipulatio fructuaria*, 166, *tribunicia stipulatio*, U. vii, 3, etc. As none but verbal obligations could be extinguished by acceptilation (which see), it was the practice when a creditor was ready to give his debtor a release of a consensual obligation say, to substitute a novatory stipulation, and then acceptilate, G. iii, 170.
2. *Its form.*—There were certain recognised styles of question and answer appropriate to the contract, G. iii, 92 and note. *Spondeo? spondeo* were of the number, *ibid.*; but engagement by the word *spondeo* was competent only to citizens, 93, 119, note 3, and though derived from the Greek yet could not be rendered by a Greek equivalent, 93, note 1. The other phrases were *juris gentium*, competent to peregrins as well as citizens, and might be expressed either in Latin or Greek if parties understood, 93; but it was doubted whether an answer in one language to a question in another would do, 95.



STIPULATION—*continued*.

3. *Stipulations that were useless because of the nature of the undertaking*; (see *Contract*, 4).—Amongst these were stipulation for a thing not *in commercio*, G. iii, 97, or that could have no existence, 97a; stipulation under an impossible condition (see *Condition*, 3), 98; stipulation for something to be given, *dari*, to the stipulant which was already his, 99; one for something to be given to or done for a party to whose *jus* the stipulant was not subject, 103, (but what if to or for the stipulant and a third party? or the stipulant or a third party? *ibid.*); one to be performed by the heir of the promiser or to the heir of the stipulant (see *Obligation*, 11), 100; and one to be performed 'after' or the 'day before' the death of stipulant or promiser, (which was practically the same thing as one for performance to or by their respective heirs), 100, 117, 119. A stipulation, however, for a thing to be given or done when either was dying was valid, 100; and if a stipulant wanted to stipulate for payment after his death, his proper course was to conjoin with himself an *adstipulator* (see *Adstipulation*), 117.
4. *Stipulations that were useless because of incapacity of party*.—A stipulation was useless between a *paterfamilias* and a person subject to his *jus*, G. iii, 104. So was one in which either party was insane, 106; and one in which either was mute or deaf, speaking and hearing being essential to this particular contract, 105. A pupil old enough to understand what he was doing might be stipulant even without his tutor's *auctoritas*, but without it could not be promiser, 107, 109, (see *Pupils*); and a woman in tutelage was in the same position, 108.
5. *Stipulations useless because of defect of form*.—It was necessary that the answer should correspond to the question; therefore if the stipulant asked ten and the other party promised five, or if the question was unconditional and the answer conditional, the stipulation was useless, G. iii, 102.
6. *The actions to which the contract gave rise*.—Where the promise was to give a definite sum of money or a specific thing, the stipulant sued by a *condictio certi*, G. iv, 41, (see *Condictio, Intentio*, 2c); where what was promised was *incertum*, indefinite, he sued by an *actio incerta*, sometimes called *condictio incerti*, and more frequently *actio ex stipulatu*, G. iv, 136, (see *Condictio, Formula*, 4, *Intentio*, 2d). Although the contract was a formal one (see

STIPULATION—*continued*.

*Contract*, 3), and the promiser *ipso jure* liable on the strength of his *promissio*, G. iii, 89, note, still if it had been given on a consideration that had failed, he was allowed in equity to plead an *exceptio doli*, G. iv, 116.

STIPULATIONES EMPTAE ET VENDITAE HEREDITATIS, G. ii, 252, 257; see *Emptio hereditatis*, *Fideicommissum*, 7.

STIPULATIONES PARTIS ET PRO PARTE, G. ii, 254, 257 and n. 1, U. xxv, 15; see *Legacy*, 8, *Fideicommissum*, 9.

STIRPES and CAPITA in succession, G. iii, 8, 16, 61, U. xxvi, 2, 4, xxvii, 4.

SUBROGATIO LEGIS, adding something to an enactment, U. i, 3.

SUBSTITUTION, *substitutio*, was either ordinary, *vulgaris*, G. ii, 174–178, U. xxii, 33, or pupillary, *pupillaris*, G. ii, 179–184, U. xxiii, 7–9; see also *Testament*, 15.

1. *Ordinary substitution*.—This was nomination in a testament of one or more heirs to take as substitutes in the event of the failure of the institute or institutes, G. ii, 174, 175, U. xxii, 33, and might be continued indefinitely in a series of substitutions to substitutes, G. ii, 176, U. xxii, 33. The operativeness of the substitutions depended to some extent upon the consideration whether the institute and substitutes were nominated with or without *cretio*, and in the former case whether it was perfect or imperfect, (see *Cretio*, 1), G. ii, 174, 176–178, U. xxii, 33, 34.
2. *Pupillary substitution*.—This was nomination of a substitute to take on the death in pupillarity of an institute who had succeeded, G. ii, 179, U. xxiii, 7; and was in effect a testament made by a father for his child, living or posthumous, G. ii, 183, U. xxiii, 7, to take effect in the event of the latter dying under puberty, G. ii, 180, and before he could make one for himself, G. ii, 113, U. xx, 12. It was not necessary that the child should be instituted as his parent's heir, for a man might so substitute to his disinherited children, G. ii, 182, U. xxiii, 8; but it was necessary that the substitution should be in a testament in which the parent had validly instituted an heir, whether his child or a stranger, U. xxiii, 9.
3. *Precautions that usually accompanied a pupillary substitution*.—To obviate any risk of foul play towards the child by the individual thus substituted to him, it was the practice to make the substitution in the last tablets of the testament, and seal them up by themselves, so that the fact should not be prematurely revealed, G. ii, 181.
4. *Incompetency of pupillary substitution to a stranger institute*.—For a stranger institute it was impossible to make a

SUBSTITUTION—*continued*.

substitution of this sort ; but the same object might be attained by means of a trust, G. ii, 184, (see *Fideicommissum*, 1).

SUCCESSIO GRADUUM on intestacy was not allowed by the *jus civile*, G. iii, 12, 22, U. xxvi, 5 ; the praetors so far sanctioned it that they allowed agnates of the second or a remoter degree to come in as cognates on failure of those of the nearest, G. iii, 28, (see *Bonor. possessio*, 16).

SUCCESSION, *successio*, in its widest acceptation, included every case of passage of a man's estate, with its rights and liabilities, to another person *per universitatem*, G. ii, 97, iii, 82, as in *emptio bonorum*, G. iii, 77, adrogation, 83, and in *manum conventio*, *ibid.* (see those words) ; in its narrower signification, however, it was succession to the dead, G. ii, 157, iii, 33, etc. This arose either *jure civile* in the case of an heir taking an inheritance, *hereditas*, which was the creature of statute, G. iii, 32, (see *Hereditas*) ; or *jure honorario* in the case of an individual to whom, on considerations of equity, the praetor had granted possession of the deceased's estate, putting him *de facto* in the position of an heir, G. iii, 32, 33b, U. xxviii, 12, (see *Bonorum possessio*). In early times an *hereditas* was held acquirable by usucapion by one who had no title as heir, but simply took possession of the estate and held it for a year,—a doctrine that was afterwards disowned, G. i, 54, (see *Usucapion*, 6). The rules of succession to freedmen, under both the civil and praetorian law, differed materially from those of succession to free-born citizens, and are digested separately ; see *Succession to citizen freedmen*, *Succession to Junian latins*.

SUCCESSION DUTY, G. iii, 125 and note.

SUCCESSION TO CITIZEN FREEDMEN AND FREED-WOMEN, G. iii, 39–53, U. tits. xxvii, xxix ; see also PATRONATE.

## I. SUCCESSION TO FREEDMEN.

1. *The rules of the Twelve Tables*.—By the Decemviral Code a citizen freedman was entitled to make a testament, and to pass over his patron if he pleased, G. iii, 40, U. xxix, 1 ; and on intestacy the patron was to succeed only when the freedman left no *sui heredes*, *ibid.*, U. xxvii, 1. But this right of the patron was lost by his *capitis deminutio*, G. iii, 51, U. xxvii, 5.
2. *Praetorian rules when the freedman had made a testament*.—The praetors held the rules of the Tables to be fair enough when the patron was excluded, either testamen-

# SUCCESSION TO CITIZEN FREEDMEN AND FREED-WOMEN—*continued.*

## I. SUCCESSION TO FREEDMEN—*continued.*

tarily or on intestacy, by *sui heredes* who were issue of the deceased, but not when he was excluded by artificial *sui* (see *Sui heredes*, 1), such as a wife *in manu* or an adoptive child, G. iii, 40, U. xxix, 1. They therefore ordained that, if a freedman in his testament did not institute children of his own, he was bound to leave his patron at least one half of his estate, the latter being entitled to *bonorum possessio contra tabulas* to that extent (see *Bonor. poss.*, 8) if passed over, G. iii, 41, U. xxix, 1. But this right of his was excluded by a grant of the same *bonor. possessio* to natural children of the deceased, even those who had been emancipated by him or given in adoption; though not by a grant of it to those he had disinherited, nor even by the institution of his wife *in manu* or a child he had adopted, *ibid.*

3. *Praetorian rules when the freedman died intestate.*—In this case the same principle was applied as described in No. 2: if an intestate freedman was survived by children of his body, even emancipated or given in adoption, they took everything; but if only by artificial *sui*, his patron might claim *bonorum possessio ab intestato* of one half of his estate, G. iii, 41, U. xxix, 1.
4. *The Julian and Papia-Poppaean innovation.*—This enactment provided that if a freedman worth not less than 100,000 sesterces left fewer than three children, then, whether he died testate or intestate, his patron was to have an equal share with them; *i.e.* a half if only one, a third if two, but nothing if more than two, G. iii, 42, (see *Julian and Pap. Pop. law*, 8).
5. *Rights of children of patrons.*—If a patron had predeceased his freedman the patronate (which see, No. 1) passed to the former's children, even though disinherited, G. iii, 48, 58, 64; the patron's stranger heirs had no right to it, or to the freedman's succession, *ibid.* By the old law both sons and daughters of the patron, and the issue of sons, had the same rights as the patron himself, G. iii, 46, U. xxix, 4. The praetors called only sons of the patrons and their male descendants, G. iii, 46, U. xxix, 5. The Papian law, however, revived the right of a daughter to participate, provided she had the *jus liberorum*, *ibid.*, (see *Jus liberorum*, *Julian and Pap. Popp. law*, 7).
6. *How the rights of a plurality of patrons were adjusted.*—If the deceased freedman had more than one patron the suc-



## SUCCESSION TO CITIZEN FREEDMEN AND FREEDWOMEN—*continued.*

### I. SUCCESSION TO FREEDMEN—*continued.*

cession belonged to them equally, without regard to what had been their respective interests in him as a slave, G. iii, 59 ; if one of them declined—for they did not succeed *ipso jure*, but had to enter like *extranei heredes* (which see)—the whole succession belonged to the others, 62. If one of two patrons was dead, the survivor excluded the children of the predeceaser ; if both were dead, the son of one excluded the grandson of the other ; if both left children of the first degree, one of them say two, the other three, these took *per capita* and not *per stirpes*, G. iii, 60, 61, U. xxvii, 2–4.

7. *Rights of a patroness and her children.*—Under the praetorian rules a patroness had no greater right in the succession of her freedman than had been conferred on a patron by the XII Tables, G. iii, 49, U. xxix, 6. But the Papian law gave a free-born patroness who was mother of three children, and a freedwoman patroness who was mother of two, almost the same rights the edict had given to a patron, G. iii, 50 and n. 1, U. xxix, 6 ; and to a free-born patroness it granted in addition the same right it had itself conferred on a patron, G. iii, 50 and n. 2, U. xxix, 7. It is doubtful what were the rights of the son of a patroness, G. iii, 53 and n. 2 ; those of a daughter are not referred to.

8. *Ulpian's ordines.*—In xxviii, 7, Ulp. gives the heads of the praetorian order of succession *ab intestato* without any explanation. As they applied to freedmen they seem to have run thus :—first, the deceased's descendants of his body through males, as above, No. 3 ; second, the patron and his children, but only in concurrence with artificial *sui* of the freedman if such existed, above, No. 3 ; third, the freedman's cognates, *e.g.* the children of a daughter ; fourth, the patron's agnates ; fifth, the patron's patron, and the latter's children ; sixth, the freedman's wife, if she had not been *in manu*, and so had not been admitted in the second place ; seventh, the patron's cognates within certain limits.

### II. SUCCESSION TO FREEDWOMEN.

9. *Rights of a patron.*—A freedwoman by the old law could not make a testament without the *auctoritas* of her patron, and if she made one in which he was passed over, he had only himself to blame ; if she died intestate, he took everything, because she had no *sui heredes*,

## SUCCESSION TO CITIZEN FREEDMEN AND FREEDWOMEN—*continued.*

### II. SUCCESSION TO FREEDWOMEN—*continued.*

G. iii, 43, U. xxix, 2. Upon these rules of the Twelve Tables the praetors made no change, U. xxix, 2. The Papian law, in liberating freedwomen with four children from tutory (which see, No. 24), thus put it in their power to make testaments without *auctoritas*; but it provided that a patron should nevertheless be entitled to a share of his freedwoman's estate, varying according to the number of children by whom she was survived, G. iii, 44 and note, U. xxix, 3.

10. *Rights of a patroness.*—In the case of a freedwoman dying intestate the Papian law added nothing to the rights of her patroness; if neither of them was *capite deminuta*, everything went to the latter, because there were no *sui heredes*; but if either had suffered *capitis minutio*, then the freedwoman's children took as cognates, to the exclusion of her whose patronage had ceased, G. iii, 51. A patroness, being unable to be tutor (see *Tutory*, 22), had never had any control over her freedwoman's testament, 52; but the Papian law conferred on her, provided she had the *jus liberorum* (which see), a right of challenging it much the same as that the edict had given to a patron (see above, No. 3) in regard to the testament of a freedman, *ibid.*

SUCCESSION TO JUNIAN LATINS, G. iii, 55–71, and note to 55; see also *Junian latinity*.

1. *Position of the Junian latin in reference to his estate.*—Before the Junian law those whom it made latins had been *de jure* slaves, though *de facto* free; their estates therefore were *de jure* only *peculia* (see *Peculium*), and the property of their manumitters, G. iii, 56. With acquisition of *de jure* freedom there was an end of the *peculium* properly so called; but the consideration presented itself that this would be a fraud on the manumitters, who were not patrons in the sense of the Twelve Tables, and so were not entitled to succeed to their freedmen, *ibid.* Therefore by the Junian law itself it was provided that the estate of a latin should still continue to belong to his manumitters as a *quasi-peculium*, *ibid.*
2. *Right in it of the manumitter and his children and heirs.*—According to the Junian law the manumitter was entitled to deal with it testamentarily as part of his own estate, even during the lifetime of his freedman; his

SUCCESSION TO JUNIAN LATINs—*continued.*

disinherited children, contrary to the rule in reference to succession to citizen freedmen (which see), had no right to it, G. iii, 63; it went to the heirs, even strangers, named in his testament, 58, 63, 64, or to a legatee if he chose to bequeath it, G. ii, 195. But the Largian senatusconsult altered this rule, and gave it first to the manumitter himself, next to his descendants not expressly disinherited, and only in the third place to his heirs, G. iii, 63–71.

3. *What if there had been more manumitters than one?*—In such case they took *pro rata parte*,—according to the interest they had severally had in the latin before manumission, G. iii, 59; the heir of one that had died was not excluded by another who survived, 60; and if all were dead their successors took not *per capita* but according to the interests of the several manumitters they respectively represented, 61. If one of a plurality of manumitters, or his representatives, failed to take, his share became caducous (see *Caducity*, 7) and passed to the state, 62.
4. *What if a latin had obtained a grant of citizenship unknown to his manumitter?*—If such a grant had been obtained from the emperor *salvo jure patroni*, or even without such reservation but unknown to his manumitter, the grantee was indeed a citizen during his life, but still a latin in his death; his children, though lawful, could not be his heirs; his testamentary capacity was limited to institution of his patron, with a substitution (which see, No. 1) in the event of his failure, G. iii, 71. So it was enacted by Trajan; but a Sct. of Hadrian's afterwards provided that if a latin in such a position subsequently proved cause under the Aelia-Sentian law or the senatusconsult, (see *Causae prob. ex l. Ael. Sent.*), he should be held to have acquired citizenship effectually, and be entitled to dispose of his estate as a citizen freedman, 73.

SUCCESSORIUM EDICTUM, see *Edictum successorium*.

SUI HEREDES, often called *sui et necessarij heredes*.

1. *Who were sui heredes?*—A man's *sui heredes*—for a woman could have none, G. iii, 51, U. xxvi, 7—were those of his descendants *in potestate*, natural or adoptive, who were to or had become *sui juris* by his death, as also his wife *in manu*, and his daughter-in-law who had been *in manu* of a deceased son, (see *Manus*, 4), G. ii, 156, 159, iii, 2, 3, U. xxii, 14, xxvi, 1. Those *postumi* (which see) were included who, had they been born earlier, would have been *in potestate* and become *sui juris* by the parent's

SUI HEREDES—*continued.*

death, G. iii, 4, U. xxii, 15; also children on whose account there had been *causae probatio* after their father's death, (see *Caus. prob. ex l. Aelia Sentia*, 3, *Erroris caus. prob.* 2), G. iii, 5; and a son manumitted after his father's death from a first or second mancipation (see *Emancipation*, 3), G. iii, 6. In the law of succession to freedmen, a distinction was made between natural and artificial *sui heredes*, meaning by the latter a wife *in manu* or an adopted child, G. iii, 40, 41, U. xxix, 1, 5.

2. *Why called sui.*—They were so called because they were *domestici heredes*,—because they had all along been in a manner owners of the family estate, G. ii, 157, *i.e.* the *familia* or *patrimonium*, G. ii, 102, and were thus their own heirs or heirs of what had been their own. It was for this reason that their parent making a testament was bound either to institute or disinherit them, G. ii, 123, U. xxii, 14, (see *Testament*, 10); that *agnatio sui heredis* (which see) invalidated a testament made by the parent previously, U. xxiii, 2; and that on his death intestate they had the first place in the succession, G. ii, 157, iii, 1, U. xxvi, 1.

3. *Why also called necessarii?*—For the very same reason for which they were called *sui*,—because, as in a manner already owners of it, '*juris necessitate hereditati adstringuntur*,' G. iii, 87, and if not disinherited were heirs whether they would or not, G. ii, 157, though by the praetors permitted to abstain, 158; see *Hereditas*, 3.

SUI JURIS PERSONAE, persons not subject to any family head, but themselves *patres* or *matres familiae*, U. iv, 1 and note. They might cease to be so by *capitis deminutio* (which see), as by adrogation or *in manum conventio*, G. iii, 83; but so long as they were *sui juris* they were their own masters, except in so far as controlled by tutors or curators on account of age, sex, or infirmity, (see *Tutary, Curatory*).

SULPICIUS RUFUS, SERV., see *Servius Sulp. Ruf.*

SUPERFICIES SOLO CEDIT, G. ii, 73; see *Property*, 6.

SURDUS, see *Deaf person*.

SURETYSHIP, *adpromissio*, G. iii, 115–127.

1. *Suretyship in general.*—The purpose of every *adpromissio* was to secure performance of an obligation by a third party, G. iii, 117; consequently, as his undertaking was accessory only, no surety was liable for more than the principal debtor, though his liability might be for less, 126. There were three varieties of it, *sponsio*, *fidepromissio*, and *fidejussio*, 115, in all of which responsibility



SURETYSHIP—*continued*.

was imposed upon the surety by verbal contract, (see *Verbal obligations*), 116; there being forms of question and answer specially adapted to each variety, 116, 92, note 1.

2. *Sponsio and fidepromissio in particular*.—Sponsors and fidepromissors could become accessory only to verbal obligations, G. iii, 119. Their engagement, however, might be binding even though that of the principal debtor was not, *e.g.* that of a person who had promised something after his death, or of a pupil or a woman who had promised without tutorial *auctoritas*, (see *Stipulation*, 3, 4), 119; but a sponsor could not be taken bound for the engagement by *sponsio* of a slave or peregrin, because they were not entitled to use the word *spondeo*, (see *Stipulation*, 2), *ibid.* The heirs of sponsors and fidepromissors were not liable, 120, iv, 113; unless in the case of a peregrin fidepromissor, whose liability was recognised by the law of his own state, G. iii, 120.
3. *Enactments in aid of sponsors and fidepromissors*.—By the Furian law, which did not apply out of Italy, G. iii, 121*a*, their liability was limited to two years, 121 and note; if there were more than one, each was liable only for his share, even though some might be insolvent when action was raised, *ibid.*; and if the creditor had exacted from one more than his proportion, the statute gave the latter *manus injectio pro judicato* (see *Legis actiones*, 5) to compel its restitution, G. iv, 22. By the still earlier Apuleian law a plurality of sponsors or fidepromissors had been put in the position of partners, one paying more than his share being entitled to relief from the others, G. iii, 122 and note; but this was considered to have been tacitly repealed by the Furian law so far as Italy was concerned, 122, though the benefit of it survived in the provinces, *ibid.* By the Cicereian law certain duties were imposed on creditors taking sponsors or fidepromissors, whose neglect gave the latter a qualified right to have their engagements cancelled, 123 and note; while a Cornelian law, except in one or two special cases, limited the amount for which a sponsor or fidepromissor could become bound, 124 and note, 125.
4. *Fidejussio in particular*.—A fidejussor might become accessory not merely to a verbal contract but to any sort of obligation, whether civil or natural, and even to that of a slave, G. iii, 119*a* and n. 1, which in itself was civilly useless, 104; his heir was as much bound as himself, 120; his

SURETYSHIP—*continued*.

liability was unlimited in point of time, 121 ; but as the Cornelian law expressly applied to him, it was limited in amount, 124. Where there was a plurality of fidejussors, each was liable *in solidum* ; though when one only was sued, he was entitled to invoke Hadrian's *beneficium divisionis*, and have action limited to his share, 121, 122. The provisions of the Apuleian, Furian, and Cicereian laws did not apply to a fidejussor, 121, 123 ; but in practice he had the benefit of the last, 123.

5. *The surety's right of recourse*.—By a Publilian law of the fourth century of Rome, G. iii, 127 and n. 2, a sponsor who had paid for the principal debtor was allowed to use *manus injectio pro judicato* against the latter if he did not relieve his surety within six months, G. iv, 22, 25 ; and under the formular system an *actio depensi* was substituted, which was *in duplum*, G. iii, 127, the defender being required besides to give *cautio judicatum solvi* (see *Cautiones etc.*), G. iv, 25, 102. But he did not require to wait the six months ; for, in common with fidepromissors and fidejussors, he was entitled to proceed against the debtor at once in an *a. mandati*, (see *Mandate*, 5), G. iii, 127.

SUSPENDED RIGHTS, examples of.—A man's rights as a citizen were suspended during his captivity in an enemy's hands, but revived on his recrossing the frontier, G. i, 129, 187, U. x, 4. The *patria potestas* was suspended as long as a *filiusfamilias* was in a first or second *mancipium*, but revived on his manumission, G. i, 135, U. xxiii, 3. The ownership of a legacy by vindication was in suspense until the legatee had intimated his acceptance, G. ii, 200 ; so was that of a conditional legacy in the same form until the condition was fulfilled, *ibid.* The question whether a contract was one of sale or location was sometimes in suspense, to be determined by subsequent events, G. iii, 146. When a novatory obligation was conditional, the extinction or non-extinction of the old one was in suspense so long as the condition was open, G. iii, 179.

SYNGRAPHA, G. iii, 134 and note ; see *Literal obligations*, 2.

TABULAE HONESTAE MISSIONIS, honourable discharges to soldiers, frequently conferring on them peculiar privileges, G. i, 57, note ; see *Soldier*.

TALIO, G. iii, 223 ; see *Personal injury*, 2.

TAXATIO CONDEMNATIONIS, G. iv, 51 ; see *Condemnatio*, 2.

TEMPUS DELIBERANDI, time allowed a stranger heir, instituted without cretion, for considering whether or not he would accept the inheritance, G. ii, 162; see *Hereditas*, 6.

TESTAMENT, *testamentum*, G. ii, 99–289, U. tits. xx–xxv; see also HEREDITAS. For definition of testament, see U. xx, 1.

#### I. HISTORY OF TESTAMENTS.

1. *The testament calatis comitiis*.—This was the earliest form of testament known to the Romans. Its validity depended apparently on a vote of the legislature, which met twice a year to consider matters of the sort, G. ii, 101, U. xx, 2.
2. *The testament in procinctu*.—The *test. in calatis comitiis* could be made only in time of peace; to meet the case of a man desiring to make one on the eve of battle, that *in procinctu* was introduced, the army taking the place of the *comitia*, G. ii, 101, U. xx, 2.
3. *The testament per aes et libram in its original form*.—After the introduction of the *negotium per aes et libram*, which also was a public act in the presence of five citizen witnesses, probably the representatives of the five Servian classes, and thus also of the legislature, G. ii, 104, note 8, and its adaptation to conveyance of property and creation of obligations (see *Aes et libra*), advantage seems to have been taken of it as suitable also for *mortis causa* disposition. The parties were the testator and a friend who was to become his heir, together with a *libripens* and the five citizens, G. ii, 102, 103; and the testator formally mancipated his estate to his friend, who hence got the name of *familiae emptor*, purchaser of the family estate, *ibid.*, and who probably gave the testator a single coin, *nummus unus*, as the price of the nominal purchase, G. ii, 105, 252. It rather appears that this was not a testamentary act in the proper sense of the words, but an absolute transfer of the estate to the *familiae emptor*, who took it however subject to verbal instructions as to how he was to deal with it on the death of the mancipient, G. ii, 103.
4. *The amended testament per aes et libram*.—After a time important changes were introduced,—the will was reduced to writing, the heir ceased to be a party to the *mancipatio*, and though a *familiae emptor* still officiated, he was there only for form's sake, without any personal interest in the testament, G. ii, 103. The amended procedure is described in G. ii, 104 and notes, and briefly referred to in U. xx, 2. It consisted of two distinct parts, the *familiae venditio* and the *nuncupatio testamenti*, otherwise *testatio*, G. ii, 104, U. xx, 9. In the

TESTAMENT—*continued*.I. HISTORY OF TESTAMENTS—*continued*.

first the *familiae emptor* formally purchased the *universitas*—not the individual items—of the testator's estate, but under reservation to the latter of free power of disposal, and under the explanation that the ceremony was intended simply to give point and validity to what was to follow, G. ii, 104. In the second the testator, displaying his closed testament, declared it to contain his will, and called upon the witnesses to grant him their testimony to the *nuncupatio*, *ibid*.

5. *The so-called praetorian testament*.—As a mistake in or an omission of any part of the solemnities of a testament *per aes et libram* rendered it null and void, G. ii, 114, 119, and the intentions of a testator were thus often defeated, the praetors interfered, declaring they would give *bonor. possessio secundum tabulas* to the heirs nominated in any testament made by one who was a citizen *sui juris* at the time and at his death, and which bore the seals of seven citizen witnesses, G. ii, 147, U. xxviii, 6, (see *Bonor. poss.*, 10, 11). This is often called a praetorian testament, though the phrase is not in the texts; it did not, however, give the nominee in it the *hereditas*, or entitle him to the name of heir, G. iii, 32, (see *Bonor. poss.*, 5).

## II. REQUISITES OF A TESTAMENT PER AES ET LIBRAM, AND CONSEQUENCES OF THEIR ABSENCE.

6. *Capacity in the testator*.—The testator required to have *testamenti factio*, i.e. to be a citizen and *sui juris*, G. ii, 114 and n. 1, 147; neither peregrins, U. xx, 14, nor Junian latins, G. i, 23, U. xx, 14, nor deditician freedmen, G. i, 25, iii, 75, U. xx, 14, could make a testament, though a citizen freedmen might, G. iii, 40 f. (see *Succession to cit. freedmen*, 1); nor could any person *alieni juris* do so, G. ii, 112, except a *filiusfamilias* dealing with his *peculium castrense* (which see), G. ii, 106, or a public slave, who could test on one-half of his *peculium*, U. xx, 16. The testator required further to have reached the age of puberty, fourteen if a male, twelve if a female, G. i, 40, ii, 113, U. xx, 12; and to be neither insane, nor interdicted as a prodigal, nor deaf or mute, G. ii, 113, U. xx, 13 (although the last objection may possibly not have prevented his testament being given effect to as a praetorian one).
7. *Observance of formalities*.—It was requisite, in order to the testament's being held *jure factum*, that the solemnities of the *familiae venditio* and *testamenti nuncupatio* should



TESTAMENT—*continued.*II. REQUISITES OF A TESTAMENT, etc.—*continued.*

be carefully observed, and that the *familiae emptor*, *libripens*, and witnesses should be properly qualified, G. ii, 114, 119. They required to be persons with whom the testator had *testamenti factio*, U. xx, 2, *i.e.* persons whom he might lawfully make his heirs, G. i, 114, note 1; a Junian latin therefore could act in any of those capacities, U. xx, 8. No one who was *in potestate* of the testator or *familiae emptor*, or in the same *potestas* as the latter, or his *paterfamilias*, could act as witnesses, domestic testimony being prohibited, G. i, 105–107, U. xx, 3–6; but the prohibition did not extend to those domestically related to the heir or a legatee, although employment of relatives of the former was usually avoided, G. ii, 108. Mutes and deaf persons, lunatics, pupils, and women, were all incapable of assisting in the execution of a testament, U. xx, 7. Omission or defect of formalities, while fatal to the testament *jure civili*, yet did not prevent its being given effect to *jure praetorio* if sealed by seven witnesses, see above No. 5; but the texts do not say whether the praetors required in them any other qualifications than simply citizenship, G. ii, 147, U. xxviii, 6.

8. *Tutorial auctoritas in the case of women testators.*—On the position generally of women in tutelage, see *Tutory*, III., IV. When a woman was in tutelage—by the Julian law some were free from it, see *Jul. and Pap. Popp. law*, 2—it was absolutely necessary to the *jure civili* validity of her testament that she should have tutorial *auctoritas*, G. ii, 112, 118, U. xx, 15. Anciently, when women were in tutelage of their agnates, they could rarely make a testament without first performing *coemptio* (see *Manus*, 7), and thus obtaining fiduciary tutors with whom they had previously bargained for *auctoritas*, G. i, 115a, ii, 112; but the tutory of agnates having been abolished by the Claudian law, G. i, 157, 171, U. xi, 8, the senate, in the time of Hadrian, enacted that a tutor should in future not be entitled to refuse his *auctoritas* unless he was the woman's patron or *parens manumissor*, G. ii, 112, 122,—then their wards could not compel to grant it, G. i, 192. In point of form, however, it was still necessary *jure civili*; but its absence did not prevent the testament being given effect to *jure praetorio* where the neglected tutor was neither patron nor parent, G. ii, 119–122.
9. *Institution of an heir or heirs.*—This was absolutely essential to the testament in point of substance, G. ii, 116,

TESTAMENT—*continued*.II. REQUISITES OF A TESTAMENT, ETC.—*continued*.

284; it was the *caput et fundamentum* of the whole deed, G. ii, 229, U. xxiv, 15, and could not be supplied in any subsequent writing, *e.g.* a codicil, G. ii, 273. It had to be made moreover *sollemni more*, G. ii, 116, *i.e.* in one or other of the traditional styles enumerated in G. ii, 117, U. tit. xxi; and, where it was a stranger that was being instituted, usually had coupled with it a *cretion* clause, requiring him to enter within a limited period, G. ii, 164 f., U. xxii, 27 f. (see *Cretio*). And there might be any number of heirs; a sole heir being said to be instituted *ex asse*, one of several *ex parte*, G. ii, 259. But if a co-heir was instituted *poenae causae*, *i.e.* with a view to coerce him with whom he was conjoined to a particular course of action, the penal institution was useless, G. ii, 243. Further it was impossible to institute an individual to take on the heir's death, G. ii, 277.

10. *Institution or disinheriton of children*.—Another requirement of the *jus civile* was that the testator should either institute or disinherit the *sui heredes* (which see), G. ii, 123, U. xxii, 14; they were in a manner joint-owners with him of the family estate, G. ii, 157, and were not to be deprived of their birth-right otherwise than expressly. But while the praeterition of a son *in potestate* invalidated the testament, G. ii, 123, U. xxii, 16,—though the Proculians held this to be the case only if he survived his father, G. ii, 123,—and entitled the *filius praeteritus* to eject the instituted heir, even when the latter had obtained a grant of *bonor. possessio secundum tab.* (which see, Nos. 1, 4), U. xxviii, 13, praeterition of other *sui heredes* merely entitled them by the *jus civile* to claim a share by accretion, G. ii, 124, U. xxii, 17, (see *Adcretio*, 3), and by the praetorian law to *bonor. possessio contra tabulas*, G. ii, 125, 126, U. xxviii, 3, as corrected in *Additions etc.*, (see *Bonor. poss.*, 6). It was necessary also, as a precaution against subsequent invalidation of his testament by *agnatio sui heredis* (see below, No. 22), for the testator to institute or disinherit his *postumi* (which see), G. ii, 130, U. xxii, 19, 21; and to institute or disinherit even the children of his immediate male *sui heredes*, in case the latter should predecease him, and the former nullify his testament by *quasi agnation*, G. ii, 133, 134. The *jus civile* did not require that emancipated children should be instituted or disinherited, for they had ceased to be *sui*, G. ii, 135, U. xxii, 23; but the praetors made their in-

TESTAMENT—*continued.*II. REQUISITES OF A TESTAMENT, ETC.—*continued.*

stitution or disherison incumbent, *ibid.*, giving them *bonor. possessio contra tab.* if passed over, but only on condition of collation, *ibid.*, U. xxviii, 2, 4, (see *Bonor. poss.*, 7). As regarded adoptive children, see *Adoption*, 6, 7. A mother making a testament was not required to disinherit children she did not institute, for she had no *sui heredes*, G. iii, 71.

11. *Form of disherison.*—A son had to be disinherited *nominatim*, i.e. by special reference, G. ii, 127, U. xxii, 20. According to the *jus civile* other *sui* were sufficiently disinherited in a general or *ceteri* clause, G. ii, 128; but the praetors required that males, e.g. grandsons, should be disinherited *nominatim*, 129. A posthumous son had to be disinherited in the same way as a living one; but female and remoter male *postumi* might be disinherited by the *ceteri* clause, provided some trifling legacy was left them to show they had not been forgotten, G. ii, 132, U. xxii, 21, 22. Disherison of descendants of an immediate male *suius* required to be in the same form as that of *postumi*, G. ii, 134; while by the edict that of emancipated children was to be in the same form as that of living *sui*, G. ii, 135, U. xxii, 23. The disherison required to be in the testament itself; if omitted there it could not effectually be supplied in a codicil, G. ii, 273.
12. *Ultior consequences of disherison.*—Disherison deprived the disinherited of all right to the *hereditas*—they might still take legacies—under the testament, yet did not deprive them of their patronage over and right of succession to their parent's citizen freedmen, G. iii, 58, 64, (see *Patronate*, 2, *Succession to citizen freedmen*, 5); if it was *nominatim* disherison, however, it did deprive them of their right to the estates of his Junian latins, 58, 63, 64, (see *Succession to Junian latins*, 2). As regarded the parent, the fact that he had disinherited his child did not preclude him from still making a pupillary substitution on the child's account, G. ii, 182, (see *Substitution*, 2).
13. *What strangers might be instituted.*—The general rule was that a testator could institute those only with whom he had *testamenti factio*, U. xxii, 1. This excluded peregrins and deditician freedmen, G. i, 25, but not Junian latins, U. xxii, 3; these might competently be instituted, though they could not take the *hereditas* unless they became citizens within the hundred cretion days, *ibid.*, (see *Jus capiendi*). By the Voconian law (see G. ii, 226, note) institution of a woman by a testator whose fortune

TESTAMENT—*continued.*II. REQUISITES OF A TESTAMENT, ETC.—*continued.*

amounted to 100,000 *asses* was prohibited, G. ii, 274. An *incerta persona* (which see) could not be instituted, G. ii, 287, U. xxii, 4; neither could a *postumus alienus* (see *Postumi*, 3), G. i, 147, ii, 242, because regarded as an *incerta persona*, *ibid.* A municipality was *incertum corpus*, and could not be instituted except by its freedmen, U. xxii, 5. A few specially favoured divinities might be instituted, thanks to certain *senatusconsults* and imperial constitutions, U. xxii, 6.

14. *Institution of persons alieni juris.*—It was incumbent on a testator either to institute or disinherit those of his own *filiifamilias* who were to become *sui juris* by his death; see above, No. 10. But he might also institute a *filiusfamilias alienus*; the institution being practically in favour of the *paterfamilias*, for whom he acquired, and without whose orders he could not enter, G. ii, 87. A *servus alienus* might also be instituted, provided the testator had *testamenti factio* with his owner, U. xxii, 9; who would take under the institution depended on the condition of the institute at the time of entry, as explained in G. ii, 189, 190, U. xxii, 9, 10. It was useless for a man to institute his own slave except with freedom, G. ii, 187, U. xxii, 7, 12; and even with freedom institution was impossible if the testator held him only in bonitarian ownership (which see), for freedom in that case could make him only a latin, and could not qualify him to be an heir, G. ii, 276, note, U. xxii, 8. If the testator was insolvent, and instituting his slave as necessary heir to save himself from being made a bankrupt after death, the Aelia-Sentian law declared the age of the slave immaterial, G. i, 21, U. i, 14; but in other circumstances institution with freedom of a slave under thirty was useless, for it could not make him a citizen, and so could not qualify him to enter, G. ii, 276, U. xxii, 8, (see *Aelia-Sentian law*, 3, 5). The effect of the institution, when valid, varied according as the slave had remained in the same condition until the testator's death, or had been manumitted after the date of the testament, or had been alienated, G. ii, 188; in the first case he became free and necessary heir, in the second he might take the inheritance or decline it as he pleased, in the third he had to take his orders from his new owner and did not become free, *ibid.*, U. xxii, 11, 12. Institution of a person *in causa mancipii* (see *Mancipii etc.*) by him to whom he was subject for the time, also required to be with freedom, G. i, 123.



TESTAMENT—*continued*.

## III. PROVISIONS IN TESTAMENTS OVER AND ABOVE THE INSTITUTION OF AN HEIR.

15. *Substitutions*.—A substitution might be of an heir to take in the event of the failure of the institute, or of one to take in the event of the heir succeeding, he being one of the testator's children, but subsequent death in pupilarity ; see *Substitution*.
16. *Legacies*.—See *Legacy*.
17. *Trust gifts*.—See *Fideicommissa*.
18. *Appointment of tutors to wife or children*.—See *Tutory*, 1, 10.
19. *Enfranchisements of slaves*.—See *Manumission*, III.
20. *Relation of such provisions to the institution*.—As the whole value of a testament depended on the institution of an heir, G. ii, 229, U. xxiv, 15, a legacy placed before it was useless, G. ii, 230, U. xxiv, 15, though the same rule did not apply to *fideicommissa*, U. xxv, 8. A grant of freedom was useless if in the same position, G. ii, 230. A tutor's appointment could not become operative until an heir had succeeded, G. i, 186 ; but as the former really took nothing from the latter, it was a matter of dispute whether it was enough to invalidate the appointment that it preceded the institution, G. ii, 231.

## IV. INVALIDATION OF A TESTAMENT AFTER EXECUTION, AND ITS CONSEQUENCES.

21. *Invalid testaments generally*.—A testament was said to be *non jure factum* when it was *ab initio* invalid through absence of some condition or requirement of law, G. ii, 146, 147. One that was *jure factum* might be subsequently invalidated, *infirmatum*, in one or other of two ways,—it might be either *ruptum* or *irritum factum*, G. ii, 146, U. xxiii, 1-4.
22. *Ruptio testamenti*.—This occurred when a testator made a new will in all respects regular, even though no one was in a position to take under it, G. ii, 144, U. xxiii, 2. It would rather appear that nothing less than this, (or the destruction of the deed), amounted to *ruptio* ; although if the intention of the testator that his testament should not stand was otherwise distinctly manifested, and the heir *ab intestato* obtained *bonorum possessio*, any attempt to oust him by the testamentary heirs might be defeated by *exceptio doli*, G. ii, 151. There was *ruptio* also by *agnatio* or *quasi agnatio sui heredis*, birth or advent in some other way, of a *suus heres*, which in some cases could, in others could not, be prevented by their testamentary institution or disherison, G. ii, 138-143, U.

TESTAMENT—*continued*.IV. INVALIDATION OF A TESTAMENT, ETC.—*continued*.

xxiii, 3 ; see the cases in which it occurred under *Agnatio sui heredis*.

23. *Irritancy of a testament*.—A testament was irritated when the testator suffered *capitis deminutio* (which see), G. ii, 145, U. xxiii, 4. Ulp. adds that it was also said to be irritated when no one became heir under it, U. xxiii, 4 ; (but it was usual then to say it was *destitutum*).
24. *Consequences of ruction or irritancy*.—Though a testament thereby became useless *jure civili*, yet the praetors granted *bonor. possessio secundum tabulas* to the heirs nominated in it, provided the testator was a citizen and *sui juris* at his death, and that no one claimed the possession preferentially *contra tabulas*, G. ii, 147, U. xxiii, 6, xxviii, 5 ; (see details under *Bonor. possessio*, 10–12).

## V. INFORMAL TESTAMENTARY DEEDS.

25. *The testamentum militis*.—A soldier, even a *filiusfamilias*, U. xx, 10, making his testament while on active service was exempted from almost all of the above requirements and restrictions ; the *familiae venditio*, *nuncupatio*, and five witnesses were dispensed with, it being enough that he informally manifested his will, G. ii, 109, U. xxiii, 10. Not being *juris civilis*—though introduced by imperial enactments, U. xxiii, 10—the testator was free to institute whom he pleased, and even a peregrin, G. ii, 110 ; latins, *caelibes*, and *orbi* might take under his testament regardless of the Julian prohibitions, 110, 111 ; he might with impunity place legacies and grants of freedom before the institution of his heir, U. i, 20 ; and might declare that they were not to take effect until after the heir's death, *ibid*. Such a testament was valid if the testator died in active service, or within a year of his discharge, U. xxiii, 10.

26. *The codicil*.—See *Codicil*.

TESTAMENTI FACTIO explained in G. ii, 114, note 1.

TESTIMONIUM PERHIBERE, G. ii, 104 and n. 7.

THEFT, *furtum*, G. iii, 183–208 ; see also *Delict*.

1. *What constituted theft*.—There could be no theft without *dolus malus*, G. iii, 197, *adfectus furandi*, G. ii, 50, iii, 208, belief that the owner of the stolen property, if he knew of the thief's act, would object, G. iii, 197. Where this *dole*, *adfectus*, and belief were present, then, as a general rule, any contrectation with another man's property without his consent was theft, 195,—for if, unknown to the delinquent, the owner did consent, it was

THEFT—*continued.*

- not, 198,—as by taking it away, 195, or selling and delivering it to a third party, G. ii, 50, by using what had been deposited with him, G. iii, 196, or by putting what had been borrowed by him to another purpose than that for which it had been lent, 196, 197; although there were one or two cases in which a man might knowingly take possession of and even usucapt *res alienae* without theft, 201.
2. *What might be stolen.*—There might be theft not only of *res alienae*, G. iii, 195, but also of free persons, 199, and even of the thief's own property when lawfully in possession of a third party, 200.
  3. *Who were accounted thieves.*—He was held a thief who had purposely facilitated the crime, and not merely the actual delinquent, G. iii, 202; provided, in either case, that, if impubere, he was *pubertati proximus*, and knew what he was about, 208.
  4. *Varieties of theft.*—The law recognised two varieties of theft, *furtum manifestum* and *f. non manifestum*, G. iii, 183–185, there being some dispute as to where one ended and the other began, 184; also three quasi-varieties, *f. conceptum*, *f. oblatum*, and *f. prohibitum*, 183, 188, or more properly three conjunctions of circumstances giving rise to *actiones f. concepti, oblatis, et prohibiti*, 183.
  5. *Its penalties.*—Manifest theft, under the Twelve Tables, was visited with capital punishment, but under the edict with a fourfold money penalty, G. iii, 189; non-manifest, under both systems, with a twofold penalty, 190. There was under both systems a threefold penalty on a party in whose premises stolen goods were discovered on formal search, whether the thief or not, *f. conceptum*, 186, 191, 192, note 3; while the owner of such premises, if not himself the thief, could in turn demand a threefold penalty from the person who had feloniously introduced the goods, *f. oblatum*, 187, 191. The Twelve Tables dealt with *f. prohibitum*—i.e. refusal by a man to permit formal search in his premises, *lance et linteis*, for stolen goods—as *f. manifestum*, the edict substituting an *a. furti prohibiti*, with fourfold penalty, 188, 192, 193.
  6. *The actio furti.*—The *actio furti*—formula in G. iv, 37 and notes—was not in every case competent to the owner of the stolen property, but rather to the party who was the direct sufferer by the loss, G. iii, 203; as e.g. a creditor responsible to his debtor for the safety of a pledge, 204, a tradesman responsible for that of an article intrusted to him to repair, 205, or a borrower responsible to the

THEFT—*continued*.

lender for what had been given him in commodate, 206 ; but if any of these were insolvent, then the *a. furti* was competent to the owner, 205.

7. *The vindicatio, condictio furtiva, etc.*—In addition to this penal action, the thief might be sued by the owner in a *vindicatio* for recovery of the stolen property if extant, G. iv, 4, or in a *condictio furtiva* if non-extant, G. ii, 79, iv, 4. The thief could not usucapt it, G. ii, 49 ; nor could any third party acquiring from him so long as it continued *res furtiva*, 49, 50.

THINGS, *res*,—classifications.

1. *Things of divine and human right.*—To the first class belonged *res sacrae* and *religiosae*, G. ii, 3 ; *sacrae* those consecrated by statute to the gods above, 5 ; *religiosae* those devoted by private individuals to the *dii Manes*, by interment in them of their dead, 6. As the provincial *solum* belonged in property either to the state or to the emperor, land there that was thus consecrated or devoted was only *pro sacro* or *pro religioso*, 7. What were called *res sanctae*, such as the walls or gates of a city, were *quodammodo divini juris*, 8.
2. *In patrimonio and extra patrimonium.*—By things *in patrimonio* Gai. seems to mean things that could not possibly belong to an individual, G. ii, 1 ; *inter alias* things that were *divini juris*, and therefore necessarily and perpetually *nullius in bonis*, 9. If a man acquired such a thing, even in the belief that it was *in patrimonio*, he acquired no right, and no length of possession could make it his, G. ii, 48.
3. *Public, private, and unappropriated.*—Public were those that belonged to an *universitas*, such as a city, and were dedicated to public uses, G. ii, 11. Such things were also said to be *nullius in bonis*, in the sense of not belonging, nor being capable of belonging, to a private individual, *ibid.* But *res nullius* meant sometimes no more than a thing for the moment unappropriated, as an animal running wild, G. ii, 66, or things belonging to an inheritance to which no heir had yet entered, 11.
4. *Corporeal and incorporeal.*—Corporeal were such as were tangible, G. ii, 13 ; incorporeal those that had only a jural existence, yet formed elements more or less valuable of a man's estate, such as the right to a succession, a usufruct, a praedial servitude, or a claim under an obligation, 14.
5. *Moveable and immoveable.*—This distinction was important in reference to mancipation, usucapion, and interdicts.



THINGS—*continued*.

Moveables could be mancipated only one at a time, and when they were before the parties; but immoveables could be mancipated in absence, and any number at once, U. xix, 8, (see *Mancipatio*, 1). Moveables could be usucapted by one year's possession, but immoveables required two, G. ii, 42, U. xix, 8, (see *Usucapion*, 1). It was the *int. uti possidetis* that was used to defend possession of the latter, while the *int. utrobi* was used to defend that of the former, G. iv, 149, (see *Interdicts*, 7, 8). The phrase *res immobiles*, though in Ulp., does not occur in Gai.; he uses instead *praedia*, *res fundi*, or *res soli*, G. i, 121, ii, 42, 54.

6. *Res Mancipi et nec Mancipi*.—See *Res Mancipi*, etc.
7. *Things present and future*.—By *res futura* was meant a thing not yet in existence but whose appearance might reasonably be expected; as the crop to be produced from a particular field, or the child to which a particular slave was to give birth; such things might, for example, be bequeathed by damnation, G. ii, 203.
8. *Fungibles and non-fungibles*.—By fungibles are meant what in the texts are described as *res quae pondere numero mensura constant*, G. iii, 90,—things whose value was generic, not specific, and which could be replaced by others of the same sort. It was only fungibles that could be given in *mutuum* (which see, No. 1), G. iii, 90; while non-fungibles could not be legated by vindication unless they belonged to the testator both at the times of bequeathing and at his death, it was enough that fungibles belonged to him at the latter date (see *Legacy*, 19), G. ii, 196, U. xxiv, 7; and while a husband in restoring the dowry had to hand over non-fungibles at once, he was allowed three years for returning fungibles, (see *Dowry*, 3), U. vi, 8.
9. *Res quae in usu vel abusu consistunt*.—This distinction was of importance in reference to usufruct, (which see No. 1). It was only what could be used and enjoyed without impairing its substance that could strictly speaking be usufructed; where the use involved destruction of or parting with the substance, *abusus*, there could only be *quasi* usufruct, U. xxiv, 26, 27.

TRADITAE, EXCEPTIO REI NONDUM, G. iv, 126a; see *Sale*, 4.

TRADITIO, delivery, see *Property*, 5.

TRANSSCRIPTICIA NOMINA, G. iii, 128–130; see *Literal obligations*, 1.

TRIPLICATION, G. iv, 128; see *Replication*.

TRUST, MORTIS CAUSA, see *Fideicommissum*.

TUBERO, Q. AELIUS, consul 743 | 11, one of the authors of a *Sct.* restricting the effects of *manus* created by *confarreatio*, G. i, 136 and note.

TUTORY, *tutela*, G. i, 142–200, U. tit. xi, was the guardianship either of pupils, *i.e.* persons *sui juris* under the age of puberty, or of females *sui juris* who had passed that age. The first was justified by the *naturalis ratio* of their imperfect years, G. i, 189; but Gai. avowed himself unable to assign any good reason for the second, which in his time had become in many cases more nominal than real, 190, while Ulp. attributes it to the weakness of the sex and their ignorance of law, U. xi, 1.

#### I. TUTORY OF PUPILS OF FREE BIRTH.

1. *Testamentary tutory*.—Testamentary appointment of tutors is said to have been confirmed by the provision of the Twelve Tables sanctioning testaments, U. xi, 14; which was held to have authorised a *paterfamilias* to appoint tutors to those of his children *in potestate* who were to become *sui juris* by his death, G. i, 144, U. xi, 15, including grandchildren who were not on that event to pass into the *potestas* of their father, G. i, 146, and *postumi* (which see No. 1), 147. The tutors so appointed were called *dativi*, G. i, 154, U. xi, 14; and any one might be appointed to the office who had *testamenti factio* (which see) with the testator, U. xi, 16, except a Junian latin, G. i, 23, U. xi, 16. But he required to be named, G. ii, 240, U. xi, 14, and to be appointed directly by the testator; a fideicommissary request to the heir to appoint a tutor (see *Fideicommissum*, 1) was useless, G. ii, 289. The usual form of appointment is given in G. i, 149; it might be conditional or *ex die*, G. i, 186; but, even when unconditional and immediate, it was inoperative until an heir had succeeded, *ibid.* As in the case of other testamentary provisions it was a question whether the appointment was of any use if placed in the testament before the heir's institution, G. ii, 231, or if to take effect after or the day before the heir's death, 234, or if made by way of penalty, 237.

2. *The tutela legitima of agnates and the gens*.—In the absence of testamentary appointment the XII Tables gave the tutory to the pupil's male agnates (see *Agnation*, 1, 2) nearest of degree, G. i, 164, U. xi, 3, hence called *legitimi*, G. i, 155, U. xi, 3; but by the Claudian law this tutory was abolished in the case of females, whether under or above puberty, G. i, 157, 171, U. xi, 8. Failing agnates it seems in early times to have gone to the pupil's *gens*, G. i, 164a and note.

TUTORY—*continued.*I. TUTORY OF PUPILS OF FREE BIRTH—*continued.*

3. *Fiduciary tutory.*—When a parent emancipated a child under puberty (see *Emancipation*, 1), the latter's final manumitter, after the example of a patron (see below, No. 18), became his tutor, G. i, 166, U. xi, 5. It was the practice for the parent to make it a condition of the final mancipation that the mancipée should remancipate to him, the parent, who then became manumitter, G. i, 133, 172, 175, and consequently tutor, G. i, 172, 175. Such a tutor was called fiduciary, G. i, 166, U. xi, 5; but if the parent himself held the office, he was, as *quasi* patron, regarded also as a tutor-at-law, *legitimus*, G. i, 172, 175, though his unemancipated children succeeding him in it were fiduciary tutors only, 175.
4. *Atilian tutory.*—If a pupil had no tutor of any of the above classes, the urban praetor and the majority of the plebeian tribunes appointed one for him, if he was in Rome, in terms of the Atilian law, while if he was in a province the governor did so in terms of the Julian and Titian law, G. i, 185, U. xi, 18. A similar and equally permanent appointment was made when a testamentary tutor or a tutor-at-law had been excused or removed as suspect, (see below, Nos. 6, 8), G. i, 182, U. xi, 23. Temporary appointments of the same sort were made when a testamentary one was conditional or to begin at a future date, G. i, 186, and while it remained inoperative through the heir's delay to enter, *ibid.*; as also while a tutor was captive in the hands of an enemy (see *Captivity etc.*), 187.
5. *Praetorian tutory.*—When it was necessary for a pupil to sue his tutor in a *judicium legitimum*, as it was improper that the latter should be *auctor in rem suam*, the praetor appointed one to act with the pupil in that particular matter, G. i, 184, U. xi, 24.
6. *Excuses of and securities by tutors.*—Gai. and Ulp. mention, without particulars, that a man was sometimes excused from undertaking a tutory, G. i, 182, U. xi, 23; and Gai. adds that, with the exception of testamentary ones, they had to give security by *satisfactio* for their administration, 199, 200.
7. *The tutor's gestio and auctoritas.*—A tutor either acted for his pupil ward, *gestio*, or with him, *auctoritatis interpositio*, U. xi, 25; the latter, however, only when the pupil was old enough to have some knowledge of what he was doing, G. iii, 107, 109. If he had several tutors the *auctoritas* had to be that of all of them, unless they held office under a testament, when that of one was sufficient,

TUTORY—*continued*.I. TUTORY OF PUPILS OF FREE BIRTH—*continued*.

U. xi, 26. As regards the acts of a pupil which required tutorial *auctoritas* to validate them, see U. xi, 27, and in more detail under *Pupils*. A tutor might sue for or defend his pupil, and in either case the *condemnatio* was taken in his name, G. iv, 82, 86, 87, (see *Procuratory in litigation*, 3). In matter of processual cautions he was in the same position as a procurator, G. iv, 99, (see *Cautiones etc.*).

8. *How a tutory came to an end*.—A tutory came to an end absolutely by a male pupil's *cap. deminutio*, e.g. giving himself in adrogation and thus ceasing to be *sui juris*, G. i, 102, U. viii, 5, or by his attaining the age of puberty, G. i, 145, 196, U. xi, 28; but females could not be adrogated, G. i, 101, U. viii, 5, and on reaching twelve the *tutela impuberis* merged into the *tutela mulieris*, G. i, 145. In the case of both male and female pupils it ceased relatively, i.e. as regarded a particular tutor, when he was removed as suspect, G. i, 182, U. xi, 23; when he was taken captive, 187; when, being a *tutor legitimus*,—for the rule did not apply to testamentary tutors, U. xi, 17,—he underwent *capitis deminutio* (which see), G. i, 158, 163, U. xi, 9; or when, being only an interim Atilian or praetorian tutor, the purpose of his appointment had been attained, G. i, 186, 187. In the case of a female it also ceased relatively when it was ceded by a tutor-at-law or a fiduciary tutor, G. i, 186,—that of a male pupil could not be ceded, because, as it came to an end with puberty, it was not so onerous as that of a female, *ibid.*,—or when a testamentary tutor abdicated, U. xi, 17 and n. 2, as amended in *Additions etc.*

9. *The tutelae judicium*.—Tutors who did not voluntarily render a satisfactory account of their intromissions on their wards, whether male or female, attaining puberty, might be compelled to do so in a *judicium tutelae*, G. i, 191. It was a *bonae fidei action*, G. iv, 62; but condemnation in it rendered the tutor infamous, G. iv, 182.

## II. TUTORY OF WOMEN OF FREE BIRTH.

10. *Testamentary tutory*, (see also above, No. 1).—A *paterfamilias* might by his testament appoint tutors to his daughters *in potestate*, no matter what their age, and even though married, G. i, 144; as also to his wife *in manu*, and to his daughter-in-law who had been *in manu* of a deceased son, 148. There was this peculiarity in the appointment of a tutor to a wife *in manu*—that she might have the choice of the individual



TUTORY—*continued.*II. TUTORY OF WOMEN OF FREE BIRTH—*continued.*

left to herself, *optio tutoris*; and that, according to the form of words used by the testator, her choice might be more or less limited, sometimes going so far as to entitle her to have a different tutor for each piece of business in which his intervention was necessary, 150–153. Such a tutor was called *optivus*, in contradistinction to the *tutor dativus* appointed directly by the testator, 154. A *tutor dativus*, in consideration of the long duration of a female tutory, had the right to give it up, *jus abdicandi*, when it became too onerous, U. xi, 17 and n. 2, as amended in *Additions etc.*

11. *That of agnates.*—It was introduced by the Twelve Tables, but abolished by the Claudian law, G. i, 157, 171, U. xi, 8, (see above, No. 2). One of its peculiarities was that it might be ceded by the agnate-tutor to a third party, who got the name of *cessicius tutor*, G. i, 168, 171, U. xi, 6–8.
12. *Fiduciary tutory.*—See above, No. 3; this was the same as the fiduciary tutory of pupils, except that it was of longer duration. If it was the woman's father that held this position, then, as he was also *tutor legitimus* (as *quasi patron*), he had the right to cede the tutory in the same way as agnates and patrons, G. i, 172. See the qualifications of the right of the *tutor cessicius* in G. i, 170, U. xi, 7, and below, No. 20. A fiduciary tutor other than a *parens manumissor* had no power of cession, G. i, 172.
13. *Atilian tutory.*—The Atilian and Julian and Titian laws, mentioned above, No. 4, applied to women as well as pupils, U. xi, 18; and Atilian tutories must have become all the more necessary when that of agnates was abolished. Such an appointment could be made on the woman's own petition, G. i, 173; and one of the cases in which it was authorised was the absence of her testamentary or other tutor, not being her *parens manumissor*; on the new appointment the office of the tutor thus superseded came to an end, G. i, 173. Even when in tutory of a *parens manumissor*, if he happened to be abroad, she might have a temporary tutor to enable her to enter on an inheritance, 175, 176.
14. *Praetorian tutory.*—This occurred in the same circumstances, *mutatis mutandis*, as described above, No. 5, U. xi, 24.
15. *Changing tutors by coemptio.*—G. i, 115; see *Manus*, 7.
16. *The tutor's auctoritas.*—In the *tutela mulierum* a tutor never acted for his ward, but only with her, by inter-

TUTORY—*continued*.II. TUTORY OF WOMEN OF FREE BIRTH—*continued*.

poning *auctoritas*, G. i, 190, U. xi, 25. And this was in many cases a mere matter of form, the tutor, unless a *parens manumissor*, being often obliged to grant it whether he would or not, G. i, 190, 192. A *parens manumissor* had the same power as a patron of withholding his *auctoritas* from certain acts of his ward's, G. i, 192, and below, Nos. 19, 23; but other tutors could be compelled to grant it where necessary to the validity of a deed, G. i, 190, ii, 122. For enumeration of them see *Women*, 4.

17. *How tutory of women of free birth came to an end*.—It came to an end absolutely when the ward ceased to be *sui juris*, as by passing *in manum* of a husband, U. xi, 13; when she had three children,—an event that by the Julian and Papia-Poppaeian law released her for ever from tutelage, G. i, 145, 194, U. xi, 28*a*; or when she was made a Vestal virgin, G. i, 145. It ceased relatively when a *parens manumissor* ceded his tutory, G. i, 172, though it might revert to him in certain events, G. i, 170, U. xi, 7; when he died, in which case his children became fiduciary tutors, G. i, 175; when he and his children were all *capiti minuti*, as by adrogation, G. i, 195*b*; when a testamentary tutor died or abdicated, U. xi, 17; when an Atilian tutor died, or when he had fulfilled the purpose of his appointment if only an interim one, G. i, 181; when a tutor of any sort was taken captive, 187; or when the woman herself performed fiduciary coemption with a stranger in order to have him as her tutor after remancipation, 195*a*. But, no matter how the tutory ended, it was never followed by any *judicium tutelae*, a woman's tutor having no account to render, 191.

## III. TUTORY OF PUPIL FREEDMEN.

18. *General observations*.—Manumission of a slave under puberty was probably so rare that we have very little explanation of the nature and conditions of the resulting tutory. Testamentary appointment and agnatic right being equally out of the question, it belonged by the Twelve Tables, or rather by the interpretation put upon them, to the manumitting patron and his children, G. i, 165; the latter, on the former's death, were not fiduciary tutors, but tutors-at-law as he had been, 175. In the case of a Junian latin the tutory did not necessarily belong to the manumitter; for if he had been only bonitarian owner it belonged to the party who was quiritarian owner at the date of manumission, 167. If the manu-

TUTORY—*continued*.III. TUTORY OF PUPIL FREEDMEN—*continued*.

mission had proceeded from a woman, then, as a patroness could not be tutor, an Atilian one was necessary, 195.

## IV. TUTORY OF FREEDWOMEN.

19. *The legitima tutela patronorum*, (see also *Patronate*).—Like male freedmen under puberty, freedwomen were in the tutory-at-law of their patron and of his children on his death, G. i, 165, 175; the quiritarian owner at manumission being tutor of a latin freedwoman rather than her bonitarian manumitter, 167, (see above, No. 18). This tutory being really in the interests of the patron himself, it gave him much more control over his ward than other tutors possessed, and entitled him to withhold his *auctoritas* in many cases in which they were compelled to grant it, G. i, 193, ii, 122.
20. *The cessicia tutela*.—The tutory of a woman being of indefinite duration, the patron—but no other tutor, for he alone had a *legitimum jus*—was entitled to transfer it to a third party by *in jure cessio* (which see, No. 3), G. i, 168, U. xi, 6. If the *cessicius tutor* died or was *capite minutus*, or if he in turn attempted to cede it, it reverted to the patron, G. i, 170, U. xi, 7; while if it was the latter that died or suffered *capitis deminutio*, the right of the *cessicius* was equally at an end, *ibid*.
21. *Fiduciary tutory*.—This arose in the case of a freedwoman when, with *auctoritas* of her patron-tutor, she performed fiduciary coemption (see *Manus*, 7) with a third party, who, according to agreement, remancipated her to a fourth party of her own selection, who then manumitted her, and thus became her fiduciary tutor, G. i, 115, 195a. This new tutor had no power to cede his office, G. i, 172.
22. *Atilian tutory*.—An Atilian appointment might be either permanent or interim. It was permanent when made to supply that of a deceased patron who had no male children surviving, G. i, 195c; or to supply that of a patron who along with his children had undergone *capitis deminutio*, 195b; or that of a patroness, who, because of her sex, could not be tutor, 195; or that of a fiduciary or Atilian tutor who had died or gone abroad, 173. A freedwoman could not thus supersede a patron who had gone from home, 174; but in his absence she might sometimes have an interim Atilian tutor, as when she needed *auctoritas* to enter upon an inheritance, 176,—for such entry usually required to be within a limited period (see *Cretio*, 1), G.

TUTORY—*continued.*IV. TUTORY OF FREEDWOMEN—*continued.*

ii, 164, 165, U. xxii, 7. If her patron was insane, or a mute, she was entitled to an interim tutor to aid her in constituting a dowry, G. i, 180; and for the same purpose, or to authorise her to take an inheritance, she might have an interim tutor when she was in the tutory of her patron's son, and he was a pupil, 177–179. But such occasional appointments did not affect the permanent right of the patron and his children, 181.

23. *Tutorial auctoritas.*—All other tutors than patrons and their children—for these last were also *legitimi tutores*, G. i, 175—seem to have been bound to grant *auctoritas* when demanded, G. i, 190, ii, 122. A patron seems to have been bound to grant it when his ward proposed to make a dotal provision, G. i, 178, 180, to give herself *in manum*, 115, 195*a*, or to enter on an inheritance, 176, 177; but for the reason explained above, No. 19, he could not be required against his will to aid her in making a testament, 192, ii, 122, or in alienating her *res mancipi* or undertaking an obligation, unless in either of those two cases there were weighty causes of justification, G. i, 192. For the acts of a woman to which *auctoritas* was required, see Ulp. xi, 27, and in more detail under *Women*, 4.

24. *How the tutela libertae ended.*—It ended absolutely by her passing *in manum mariti*, as above, No. 17, and, under the Julian law, when she gave birth to her fourth child, G. i, 145, iii, 44, U. xxix, 3. How it ended relatively may be gathered from what has been said in Nos. 20–22.

TWELVE TABLES, the, (*Lex Duodecim Tabularum*), the statutory basis of the *jus civile* or *legitimum*, as distinguished from the *jus honorarium*, are referred to in G. i, 111, 122, 132, 145, 155, 157, 165, 200; ii, 42, 45, 47, 49, 54, 64, 224; iii, 1, 9, 11, 17–21, 23, 27, 28, 40, 46, 49, 51, 78, 82, 85, 189–194, 223; iv, 11, 14, 21, 28, 76, 79; U. i, 9; ii, 4; x, 1; xi, 3, 14; xii, 1, 2, 3; xix, 17; xxvi, 1, 5, 7, 8; xxvii, 5; xxix, 1, 5, 6; but in many of them only by way of interpretation. The provisions of the Tables to which actual reference is made are these:—

1. *Law concerning persons.*—(a.) *Manus*,—avoidance of it by trinotial interruption, G. i, 111. (b.) *Emancipation*,—that a son should not be released from the *potestas* until mancipated thrice, ‘*si pater filium ter venumduit, a patre filius liber esto*,’ G. i, 132, and almost the same words in U. x, 1. (c.) *Manumission*,—the condition of *statuliberi*, U.



TWELVE TABLES—*continued*.

- ii, 4. (d.) Tutorship,—authorisation of testamentary tutorship in the words ‘*uti legassit super pecunia tutelave suae rei, ita jus esto*,’ U. xi, 14; agnatic tutelage of pupils, G. i, 155, U. xi, 3; agnatic tutelage of women, G. i, 157; tutorship of patrons, 165, U. xi, 3; freedom of Vestal virgins from tutelage, G. i, 145. (e.) Curatorship of lunatics and prodigals, G. ii, 64, U. xii, 2.
2. *Law concerning things*.—(a.) Usucapion,—periods of, G. ii, 42, 54; incapacity for usucapion of *res furtivae*, 45, 49, and of a woman’s *res mancipi* delivered without her tutor’s *auctoritas*, 47. (b.) Testaments and freedom of bequest,—in the words ‘*uti legassit suae rei, ita jus esto*,’ G. ii, 224, and their expansion in U. xi, 14, (quoted above). (c.) Intestate succession,—first that of *sui*, G. iii, 1, and then that of the nearest agnate, G. iii, 9, 11, both embodied in the words ‘*si intestatus moritur, cui suus heres nec escit, agnatus proximus familiam habeto*,’ U. xxvi, 1; lastly that of the *gens*, G. iii, 17. (d.) Succession of patrons, G. iii, 40, 46, 49, 51, U. xxix, 1, 5. (e.) Obligations *ex delicto*,—theft, G. iii, 189–192, iv, 76; wrongful damage to property, *rupitiae*, G. iii, note to 210–219; personal injury, G. iii, 223; other offences, G. iv, 11.
3. *Law concerning actions*.—(a.) *Legis actiones*,—*actio sacramenti*, amount of the sacramental stake, G. iv, 14; *manus injectio*, authorised by the statute in proceedings on a judgment, 21; *pignoris capio*, cases in which authorised, 28. (b.) Noxal action,—sanctioned in case of theft, 76.

UNDE VI, INTERDICTUM, G. iv, 154; see *Interdicts*, 9.

UNIVERSAL ACQUISITION, see *Adquisitio per universitatem*.

UNIVERSITAS, a corporation; see *Persons*, 6.

USUCAPION, *usucapio*, G. ii, 41–61, U. xix, 8; see also *Property*, 3.

1. *Usucapion, what?*—It is defined as acquisition of ownership by continued possession for a certain period, U. xix, 8; more accurately it was the cure by possession of some defect of title. The possession might be either by the party himself that thereby became owner, or by a slave or *filiusfamilias* on his behalf, or even by a person *bona fide* possessed by him as a slave, G. ii, 89, 94; but apparently that of his wife *in manu*, a free person *in mancipio*, or a usufructed slave was ineffectual, they not being themselves in his possession, 90, 94. The period required is commonly said to have been one year for moveables, two years for immoveables, G. ii, 42, 204, U.

USUCAPION—*continued.*

xix, 8; but the actual provision of the Twelve Tables was two years for *res soli*, for 'other things' one, G. ii, 54.

2. *Usucapion of a res Mancipi acquired by wrong conveyance.*—When a *res Mancipi* was transferred by simple tradition, instead of being conveyed by mancipation or *in jure cessio*, the legal title still remained in the transferor, the transferee becoming only bonitarian owner; by possession for the requisite period, however, he cured the defect, and became owner *ex jure Quiritium*, G. ii, 41, 204, U. i, 16. See *Property*, 1.
3. *Usucapion of a thing acquired a non domino.*—When a man acquired a thing, whether *res Mancipi* or *res nec Mancipi*, from one who was not its owner, again he might cure the defect of his title by usucapion; but in this case it was indispensable that he should have accepted it in good faith, *i.e.* under the belief that the transferor was its owner, G. ii, 43, 44. See *Bonae fidei possessio*.
4. *Usucapion by praetorian owners.*—A praetorian *bonorum possessor* did not at once become quiritarian owner of the corporeals included in the succession that was granted to him, neither did a *bonorum emptor* or purchaser of a bankrupt estate become quiritarian owner of the corporeals that formed part of it; but both cured the defect by possession for the statutory period, G. iii, 80. See *Bonorum possessio*, 5; *Emptio bonorum*, 3.
5. *Things that could not be usucapted.*—Things not in *patrimonio* (see *Things*, 2), such as a freeman possessed as a slave, G. ii, 48; provincial lands, 46, for they belonged to the state or the emperor, 7; the *res Mancipi* of a woman in tutelage of her agnates, 47,—a tutory, however, that was abolished by the Claudian law, G. i, 157, 171, U. xi, 8; *res furtivae*, *i.e.* moveables that had been stolen, not, of course, by the possessor,—for his bad faith would have been a sufficient impediment,—but by some previous holder, from whom the possessor derived his right, G. ii, 45, 49; and immoveables that had been taken forcibly by the party from whom the possessor derived them, G. ii, 45. It was conceivable that a man might sell or on some other good title transfer a moveable *res aliena* believing it his own; in such a case there was nothing to prevent usucapion by a *bona fide* purchaser or transferee, there being no theft without intent to steal, G. ii, 50. It was quite possible also for a man to take possession, without any violence, of lands that he knew were not his; the usucapion of a *bona fide* acquirer from him,

USUCAPION—*continued.*

however, was not thereby impeded; for it was held that lands could not be stolen, and so the *vitium furti* did not attach to them, 51.

6. *Usucapio pro herede*.—In this usucapion *bona fides* had no place, G. ii, 52. It arose when, in the absence of a necessary heir,—for if there was either a *suus* or a *necessarius heres* (see *Hereditas*, 3, 4) it was impossible, G. ii, 58, iii, 201,—an individual took possession *pro herede*, as heir, of things belonging to an inheritance to which he knew he had no title, G. ii, 52; by possessing for no more than a year, even though the things were immovable, he was held to have usucaptured the inheritance itself, it being regarded as one of the ‘other things’ (see above, No. 1) for which, under the provision of the Twelve Tables, the shorter period was sufficient, 53, 54. Gai. thought this ‘iniquitous’ usucapion was to be explained only by the anxiety of the early jurists to ensure as soon as possible the presence of an heir who would look after the family *sacra* of the deceased, and satisfy the claims of creditors, 55. By a *Sct.* of Hadrian’s, however, the true heir was authorised to disregard it, and proceed with his *hereditatis petitio* as if there had been no such usucapion, 57.

7. *Usureception*.—Here also there was usucapion of what was known to be another’s, so far at least as legal title was concerned, G. ii, 59. Suppose a man mancipated a thing to a friend for safety’s sake, but under a *pactum fiduciae*, *i.e.* an agreement for its reconveyance on demand (see *Fiducia*, 1); if the mancipient reacquired possession of it without reconveyance, it became his again by *usureceptio* in a year, even though an immovable, G. ii, 59, 60. If the mancipation was to a creditor by way of security (see *Fiducia*, 2), there was usureception in a year if the debt had been paid; if it had not, the usureception was possible only if the possession had not been derived directly from the creditor by way of location or grant during pleasure, 60. What was called usureception *ex praediatura* was that of a debtor who took possession of lands he had mortgaged to the state, and which had been sold by its officials; here two years were required, 61.

USUFRUCT, *ususfructus*, G. ii, 30–33; U. xxiv, 26, 27.

1. *What, and how created*.—Usufruct was the right of using and enjoying the fruits and profits of a thing, G. ii, 14, iv, 3, U. xxiv, 26, the property the while belonging to another, G. ii, 33, 93. It might be created by reservation

USUFRUCT—*continued.*

of it in mancipating lands, G. ii, 33; but the appropriate form of constitution *inter vivos* was *in jure cessio*, 30, competent everywhere as regarded moveables, 32, though as regarded immoveables competent only *in italico solo* (see *Jus Ital.*), 31, a usufruct of lands *in provinciali solo* being created by pacts and stipulations, *ibid.* It might also be created by testament, U. xxiv, 26.

2. *Quasi usufruct.*—Although properly there could be usufruct only of things whose use did not diminish their substance, U. xxiv, 26, (see *Things*, 9), there might, through means of securities for eventual restitution of a like quantity, given to the heir or legatee on whom it was a charge, be a testamentary bequest even of money or other things whose use extinguished them, U. xxiv, 27.
3. *Rights of a usufructuary.*—A usufructuary was not held to be in possession of the thing he usufructed, G. ii, 93, but only holder for the owner, G. iv, 153; consequently he could never usucapt, G. iii, 93. As usufructuary he was entitled to ordinary fruits, which, however, did not include children born to slave women, G. ii, 50; all that a usufructed slave acquired by his own labour or with funds provided by the usufructuary belonged to the latter, G. ii, 91, iii, 165, U. xix, 21; acquisitions from adventitious sources belonged to the owner, *ibid.* Manumission of such a slave by the owner did not affect the usufructuary's right,—the slave became *servus sine domino*, U. i, 19.
4. *Extinction of a usufruct.*—It was extinguished by the usufructuary's death or *capitis deminutio* (which see), G. iii, 83; but it was so highly personal that it could not be transferred to any one but the *dominus proprietatis*, in whose person the two rights became consolidated, G. ii, 30—cession to a third party was resultless, *ibid.*
5. *Actions peculiar to it.*—When disputed it might be vindicated in an *actio in rem*, G. iv, 3; while the *dominus proprietatis* might challenge it in an *a. negatoria*, *ibid.*

USURAE, see *Interest*.

USUREPTIO, see *Usucapion*, 7.

USURPATIO TRINOCTIALIS, G. i, 111; see *Manus*, 3.

USUS as a mode of creating *manus*, G. i, 111; see *Manus*, 3.

UTI POSSIDETIS, INTERDICTUM, G. iv, 148, 149, 160; see *Interdicts*, 7, 13–17.

UTILES ACTIONES, see *Actions*, 6.

UTILITAS, G. iii, 109, 160.

UTRUBI, INTERDICTUM, G. iv, 148, 149, 160; see *Interdicts*, 8, 13–17.



VADIMONIUM, the security given by a defender, who had appeared in answer to a summons, for his reappearance on a future day, G. iv, 184; resting sometimes on his own simple engagement, sometimes backed with an oath or with sureties, sometimes under reference to recuperators, 185. Its amount was determined according to certain rules described in 186.

VENDITIO, see *Sale*.

VENDITIO BONORUM, sale of a bankrupt's estate; see *Emptio bonorum*.

VENTRIS NOMINE IN POSSESSIONEM MISSIO, G. iv, 177.

VERBAL OBLIGATIONS, G. iii, 92–127; see also *Contract*, 1. Their characteristic was that a certain *verborum proprietas* was necessary in contracting, G. iii, 136. In stipulation (which see) there was question and answer, G. iii, 92; in *dotis dictio* (see *Dowry*, 1) there were words of style spoken by one only of the parties, 96; in *jurata promissio operarum liberti* (see *Patronate*, 3) there was promise without antecedent interrogatory, but accompanied with an oath, 96a. Varieties of stipulation were adstipulation (which see), 110–114, and the different forms of *adpromissio*, (see *Suretyship*), 115–127. A verbal obligation was impossible *inter absentes*, 136; and it was the only one that could be discharged by acceptilation (which see), 169, 170.

VESTAL VIRGINS, on election, were *ipso jure* freed from the *patria potestas* if *filiaefamilias*, G. i, 130, U. x, 5, or from tutory if *sui juris*, G. i, 145.

VESTING of an inheritance, see *Hereditas*, 3–7; of a legacy, see *Legacy*, 11.

VETERANS, *veterani*, G. i, 57; see *Soldier*.

VETERES, an epithet applied by Gai. to the jurists of the republic, G. i, 144 and n. 2, 145, 165, 188, ii, 55, etc.

VEXATIOUS LITIGATION, DEVICES TO PREVENT, G. iv, 171–182.

1. *Devices to restrain dishonest defence*.—To check dishonest or reckless defence, the law in certain enumerated cases condemned a man in double the amount of his normal liability, because of the temerity of his denial, G. iv, 171, (see *Cretio litis infitiatione*); but this did not extend to his heir, who might be ignorant of the circumstances, 172. In one or two actions the defender had to give his sponson to pay a third or a half more than the sum sued for by way of penalty if judgment went against him, 171,—an obligation that did not affect women or pupils, 172. Where there was neither *cretio litis* nor sponson, an oath was required that the defence was not vexatious (*jusjurandum calumniae*), exigible even from heirs, women, and pupils, 172.

VEXATIOUS LITIGATION, DEVICES TO PREVENT—*continued*.

2. *Devices to check reckless action*.—To check vexatious *actio* there might be a *calumniae judicium* or instruction to the judge to inquire, in event of defender's acquittal, whether pursuer knew that there were no grounds for the action, and if so, to condemn him in one-tenth of the value of the cause, G. iv, 175, 178; but defender, if he pleased, might require the pursuer's oath of calumny instead of the *judicium*, 176. In certain very special cases a *contrarium judicium* was allowed, under which an unsuccessful pursuer had to pay a penalty, sometimes of a fifth, sometimes of a tenth, if his action was judged groundless, 177, no matter though he had believed it well founded, 178. Where a sponsion had been required from the defender, there a restipulation was required from the pursuer, who, if he failed, was condemned to the defender in the amount of it, 180, (see *Sponsio et restipulatio*). But these were not concurrent remedies, and a defender could have only one of them, 179, 181.

VICARIUS SERVUS, G. iv, 73 and n. 1.

VINCULUM AEQUITATIS, G. iii, 119*a*, note 1.

VINDEX, G. iv, 21 and n. 5; see *Legis actiones*, 5.

VINDICARE, literal meaning, G. iv, 16, note 1.

VINDICATIO; see also *Actions*, 3.

1. *Vindicatio, what?*—*Vindicatio* was the generic name for an *actio in rem*, G. iv, 5; its specific forms being the *rei vindicatio*, *vindicatio servitutis*, *actio in rem negativa*, G. iv, 3, *hereditatis petitio*, G. ii, 120, and others.
2. *The rei vindicatio under the system of the legis actiones*.—It proceeded *per sacramentum*, G. iv, 16, 17, and notes, (see *Legis actiones*, 2); there was vindication by one party, counter-vindication by the other, 16 and note 4,—a practice whose memory survived in *in jure cessio*, (which was just a *rei vindicatio* arrested in its first stage by *confessio in jure* by one of the parties that the claim of the other was well founded), G. i, 134, ii, 24, iv, 16; condemnation was in the thing itself, G. iv, 48, and an *arbitrium litis aestimandae* followed, *ibid.* note 3.
3. *Under the formular system*.—Leaving out of view the *in rem actio per sponsionem* (which see), the *formula* of the *rei vindicatio*—except when an *incerta pars* was claimed, which was rare—contained only *intentio* and *condemnatio* (see those words); the former contained an averment of property by the pursuer, without mention of the defender, G. ii, 194, iv, 41, 87; the latter asked expressly for his condemnation, G. iv, 43. And the judge had to condemn

VINDICATIO—*continued*.

in money, 48, *i.e.* if he reached condemnation; for that might be avoided if the defender, on a finding for the pursuer, complied with the judge's order to yield the possession, G. iv, 114, note.

4. *When employed*.—It was only things extant that could be vindicated, G. ii, 79. For example, if a pupil lent money without his tutor's *auctoritas*, the property did not pass to the borrower, and could therefore be vindicated so long as in his hands and capable of identification, 82; but after it was consumed, the pupil had to be content with a *condictio*, *ibid.*

5. *Preliminary use of interdicts*.—Gaius says that the interdicts *uti possidetis* and *utrubi* (see *Interdicts*, 7, 8) were introduced in order to settle the question of possession, and thus determine which of the parties was to stand on the defensive in the *vindicatio*, G. iv, 148; this makes their introduction subsequent to the Aebutian law of 507 | 247, which sanctioned procedure by *formula* (see *Procedure*, 2); for under the earlier system both parties vindicated, (see above, No. 2).

VINDICATIONEM, LEGATUM PER, see *Legacy*, 18–21, 31, 34.

VINDICIAE, *vindicias dicere*, G. iv, 16 and n. 9; *praedes litis et vindiciarum*, G. iv, 94.

VINDICTA or *festuca*, a rod which represented the *hasta* or spear, the symbol of quiritarian ownership, G. iv, 16; its use in real actions *sacramento*, *ibid.*; in manumissions, G. i, 17, 18, 38, U. i, 6, 7, 13.

VIS BONORUM RAPTORUM, see *Robbery*.

VIS EX CONVENTU, *vis moribus facta*, G. iv, 166, note, with addition in *Additions etc.*, 170; see *Interdicts*, 13.

VOCATIO, IN JUS, G. iv, 183; see *In jus vocatio*.

VULGAR SUBSTITUTION, G. iv, 174–178; see *Substitution*, 1.

VULGO CONCEPTI, meaning, G. i, 64, note 3.

## WOMEN.

1. *Capacities and incapacities of women generally*.—Like men they might be either *sui juris* or *alieni juris*, (see those words); but if *sui juris* they were in tutory for life, G. i, 144, U. xi, 1, unless freed from it under the Julian law, G. i, 145, iii, 44, U. xi, 28a, xxix, 3, (see *Tutory*, II., IV.). They had this advantage over men,—that they became marriageable at twelve, U. v, 2, (see *Marriage*, 3), and if *sui juris* might then make a testament, G. ii, 112, 113, (see *Testament*, 6); and if *alieni juris* they might be emancipated, G. i, 132, U. x, 1, (see *Emancipation*, 1),

WOMEN—*continued.*

and be disinherited, G. ii, 129, U. xxii, 20, (see *Testament*, 11), more easily than males. As they could have no *potestas* over their children, G. i, 104, ii, 161, U. viii, 8a, (see *Pat. potestas*, 1), they could not adopt, G. i, 104, U. viii, 8a, (see *Adoption*, 4); and as they could have no *sui heredes*, G. iii, 51, U. xxvi, 7, there was no one that, in making a testament, they required to institute or disinherit, G. iii, 71. They were incompetent to perform any of the public duties of citizens; consequently they could not be tutors, G. i, 195, nor act as witnesses, etc., in a mancipation, U. xx, 7; nor could they be adrogated, G. i, 101, U. viii, 5, for that implied access to the *comitia*, G. i, 99, U. viii, 3, although there was nothing to prevent them being adopted, G. i, 101, U. viii, 5, (see *Adoption*, 2, 5). The Voconian law forbade their institution as heirs by a testator worth not less than 100,000 *asses*, G. ii, 274, although the prohibition might be avoided by a trust, *ibid.* On intestacy they could not take as agnates beyond the consanguinean degree, G. iii, 14, 23, U. xxvi, 6; but those more distantly related were admitted by the praetors as cognates, G. iii, 29, (see *Intestate succession*, 2, *Bonorum possessio*, 16).

2. *Women in manu.*—See *Manus*.
3. *Women who were married but not in manu.*—See *Husband and wife*, 3-7; *Intestate succession*, 7; *Jus liberorum*.
4. *Women in tutelage.*—See *Tutory*, II., IV. Without the *auctoritas* of her tutor a woman could not alienate a *res Mancipi*, G. ii, 80, U. xi, 27; nor could she allow one of her freedwomen to cohabit with a slave, U. xi, 27, for, in consequence of the penalty of the Claudian *Sct.*, (which see), that amounted to alienation; nor manumit a slave, U. i, 17; nor be a party to a *legis actio* or a *legitimum judicium*, U. xi, 27; nor make herself a debtor *ex contractu*, G. iii, 108, U. xi, 27; nor give herself *in manum* by *coemptio*, G. i, 115, 195a; nor constitute a dowry, G. i, 178, 180, U. xi, 20-22; nor make a testament, G. ii, 112, 113, U. xx, 15; nor enter to an inheritance by *cretion*, G. i, 176; nor discharge a debtor by *acceptilatio* (which see), G. ii, 85, iii, 171; nor take a part in any *civile negotium*, U. xi, 27, (of which most of the above are examples). But she could competently be sued in an *indebiti solutio* (which see) even though the *indebitum* had been received by her without *auctoritas*, G. iii, 91; she might contract as creditor, G. iii, 108; she might alienate her *res nec Mancipi*, G. ii, 80; and she



WOMEN—*continued*.

might take payment from a debtor so as effectually to discharge him, G. ii, 85, iii, 171. And it rather appears that, after the Claudian law had abolished the tutory of agnates, G. i, 157, 171, U. xi, 8, it was only a patron or a *parens manumissor* that could any longer withhold *auctoritas* in cases where it was formally necessary, see *Tutary*, 16, 23; and that they could do so only when what was proposed was alienation of *res Mancipi*, execution of a testament, or incurring of debt, G. i, 192.

WRONGFUL DAMAGE TO PROPERTY, *damnum injuria datum*, G. iii, 210–219, was punished by the Twelve Tables and various subsequent enactments (see note to those pars.); but the law on the subject was amended by the *lex Aquilia*, 210 and same note. See also *Delict*.

1. *The first chapter of the Aquilian law*.—By its first chapter he who dolefully or culpably, and not by pure accident, G. iii, 211, killed another man's slave or grazing quadruped was liable in his or its highest value, intrinsic and extrinsic, 212, during the previous twelve months, 210, even though of less value when killed, 214.
2. *Its second chapter*.—By this an adstipulator acceptilating in fraud of the stipulant was responsible to him for the full value, G. iii, 215, and mulcted in double damages if he denied his liability, 216.
3. *Its third chapter*.—By the third chapter he who wrongfully wounded a slave or grazing beast, or killed or hurt any other animal belonging to a third party, or did damage to any inanimate property of his, G. iii, 217, was liable in its highest value during the preceding thirty days, 218.
4. *Utiles actiones on the Aquilian law*.—To justify direct action under the statute it was necessary that the injury should have been caused directly, *damnum corpore datum*, G. iii, 219; if caused indirectly an *utilis actio* (see *Actions*, 6) was had recourse to, 202, 219.
5. *Alternative remedies*.—Where a man's slave was wrongfully killed, it was free to the owner either to sue under the statute for damages or to institute a criminal prosecution, G. iii, 213.

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